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ABSTRACT

This document contains preconference seminar outlines for the 47th Annual Education Law Association (ELA) Conference. The first of four sections, "Americans with Disabilities Act Update--Higher Education and Employees," by Christopher P. Borreca, presents legal issues related to the Americans with Disabilities Act, an adequate definition of "disability," medical and fitness-for-duty exams, among other subjects. The second section, "Technology and Teaching School Law," by Gregory A. Boris and others, comments on the use of technology such as the Internet, audio and visual media, interactive media, and graphics for classroom and long-distance law instruction. The third section, "Issues Faced by Schools in the Digital Age," by Dana T. Buckman and R. Craig Wood, covers topics involving school district liability for electronic communications, equal access for individuals with disabilities, and physical security of technological equipment. The fourth section, "Special Education K-12," contains material relating to the impact of IDEA procedural violations on special-education appeals, student discipline, and an IDEA update. (RT)

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Preconference Seminar Outlines
Education Law Association
47th Annual Conference
November 15-17, 2001
Albuquerque, New Mexico

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Education Law Association
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phone: (937) 229-3589 / fax: (937) 229-3845
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2001: A Legal Odyssey

Preconference Seminar Outlines

47th Annual ELA Conference
November 15 – 17, 2001
Albuquerque, New Mexico

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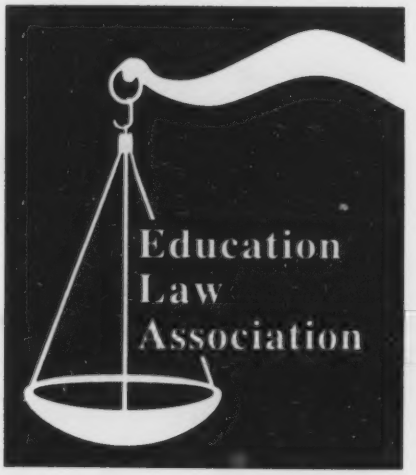

Education Law Association
300 College Park – 0528
Dayton, OH 45469
Phone: (937) 229-3589
Fax: (937) 229-3845
Email: ela@udayton.edu
Website: http://www.educationlaw.org

2001: A Legal Odyssey

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AMERICANS WITH DISABILITIES ACT UPDATE - HIGHER EDUCATION AND EMPLOYEES

Presented By

Christopher P. Borreca

BRACEWELL & PATTERSON, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
(713) 221-1408

Education Law Association Annual Conference
Albuquerque, New Mexico
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THIS OUTLINE IS INTENDED TO ASSIST PARTICIPANTS WITH A GENERAL UNDERSTANDING OF CURRENT DEVELOPMENTS IN THE LAW. IT IS NOT TO BE CONSIDERED LEGAL ADVICE.

The presenter gratefully acknowledges James Kizziar, Jay Aldis, and Penny Robinson with Bracewell & Patterson, L.L.P., in the preparation of these materials.

I. INTRODUCTION

The Americans with Disabilities Act of 1990 (the "Act" or the "ADA") protects individuals with disabilities from discrimination in employment, access to facilities, and access to services. Title I of the ADA prohibits covered employers from discriminating against qualified individuals with disabilities ("QID's") in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment.

II. IMPAIRMENTS UNDER THE AMERICANS WITH DISABILITIES ACT

A. Conditions Considered Impairments

Under the ADA, a physical or mental impairment includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[1]

B. Impairments Excluded from the ADA

Certain conditions and impairments are expressly excluded from coverage under Title I of the ADA and will not be considered "disabilities" for the purposes of employment discrimination.

1. Physical Characteristics

The term impairment does not include physical characteristics, such as hair color or left-handedness. Further, it does not include height, weight or muscle tone that are within "normal" range.[2] Advanced age, by itself, is not an impairment.[3] However, conditions which may be associated with advanced age, such as hearing or visual loss, may be impairments under the ADA.[4]

2. Personality Characteristics

Personality characteristics, such as a quick temper or poor judgment, which are not symptoms of mental or psychological disorders, are not considered impairments under the Act.[5] Similarly, traits such as irritability and chronic lateness are not impairments.[6]

3. Temporary Conditions

Temporary conditions, transitory injuries (*e.g.*, broken limb) or temporary illnesses (*e.g.*, the flu) are not considered impairments under the ADA. However, an impairment resulting from temporary medical conditions (*e.g.*, permanent partial loss of strength/motion from improperly healed broken limb) may constitute a disability under the ADA if it substantially limits performance of a major life activity.[7] Additionally, severe temporary impairments that take significantly longer to heal, long-term impairments, or impairments of indefinite duration may be disabilities.[8]

4. Illegal Use of Drugs

The illegal use of drugs is defined by the ADA as the current use of drugs, the possession or distribution of which is prohibited or regulated under the Controlled Substances Act.[9] It does not include the use of drugs taken under the supervision of a licensed health care professional, or other uses

of drugs authorized by the Controlled Substances Act.[10] However, misrepresentation of an individual's medical condition in order to obtain controlled substances by prescription is considered illegal use of drugs.[11] The current illegal use of drugs and the disorders resulting from such use are not disabilities under the ADA.[12]

An employee may not claim "relapse" into chemical dependency as an impairment or disability.[13] An employee who is either in rehabilitation or has completed a treatment program will not be protected by the ADA if the employee resumes the illegal use of drugs. ADA coverage only extends to employees who refrain from the current illegal use of drugs. The employer may discipline or terminate the employee based on the current illegal drug use.

5. Sexual Conditions

The ADA provides that specific sexual conditions (*e.g.*, homosexuality and bisexuality) will not be considered impairments and, as such, cannot be considered disabilities.[14] Other sexual conditions, including transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity disorders not resulting from physical impairments, as well as sexual behavioral disorders, are not disabilities under the ADA.[15]

6. Social Conditions

Conditions such as cultural, environmental, and economic disadvantages are not impairments under the ADA.[16] Therefore, even if an individual's ability to perform a major life activity is limited as a result of such a condition, it will not constitute a disability. The EEOC has taken the position that an employer which discriminates against an individual based on genetic information relating to illness, disease, or other disorders is "regarding" the individual as having a disability.[17]

7. Obesity

In the March 1995 supplement to the EEOC Compliance Manual (§ 902), the EEOC specifically addressed the question of whether obesity is an impairment. The EEOC reiterated in the Compliance Manual that normal deviations in height, weight, or strength are not impairments. However, "severe obesity," which the Compliance Manual defined as "100% over the norm," is "clearly an impairment," although whether obesity rose to the level of "disability" is, like all impairments, determined by the "substantial limitation" test. The EEOC also noted that persons who are morbidly obese may have underlying or related disorders such as hypertension or thyroid disorder, which are impairments.

8. Stress

A person suffering from general "stress" because of job pressures would not be considered to have an impairment. *See* ***Soileau v. Guilford of Me., Inc.***, 105 F.3d 12 (1st Cir. 1997) (inability to get along with others and to take criticism from supervisor not substantially limiting); ***Mundo v. Sanus Health Plan***, 966 F. Supp. 171 (E.D.N.Y. 1997) (inability to tolerate stressful situations is not an impairment; the ADA was not intended to categorize people with common personality traits as disabled); ***Emberger v. Deluxe Check Printers***, 7 A.D. Cas. (BNA) 907 (E.D. Pa. 1997) (language "inability to get along with others" in notice of termination not indicative of disability); ***Breiland v. Advance Circuits, Inc.***, 976 F. Supp. 858 (D. Minn. 1997) (inability to get along with co-workers not a disability). However, "stress" and "depression" may be considered impairments if they result from a documented physiological or mental disorder.[18] If a person is diagnosed by a psychiatrist as having an identifiable stress disorder, then he or she would have an impairment that could qualify as a disability.[19]

9. Miscellaneous

Other conditions which are not considered disabilities under the ADA include compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs.[20]

The determination of whether other disorders will be considered disabilities under the ADA must be made on an individualized basis. The fact that a particular disorder is not specifically excluded from coverage in the ADA does not support the conclusion that Congress intended to include the disorder within the protection of the Act.[21]

III. THE THREE-PART DEFINITION OF "DISABILITY"

A. A Physical Or Mental Impairment That Substantially Limits One Or More Major Life Activities

An individual will be considered disabled under the ADA if he or she has an impairment that substantially limits one or more of that individual's major life activities. The term "major life activities" refers to those basic activities that the average person in the general population can perform with little or no difficulty.[22] Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[23]

The major life activities listed in the ADA are not exhaustive, and the concept of "major life activities" may include, but are not limited to, other activities such as sitting, standing, lifting, or reaching.[24] The EEOC Compliance Manual, Section 902, supplemented the list of major life activities to include "mental and emotional processes, such as thinking and concentrating, and interacting with others."[25] In a 1997 enforcement guidance on psychiatric disabilities, the EEOC added "sleeping" as a major life activity.[26] Recent cases have addressed whether certain activities, including some expressly identified by the EEOC, are "major life activities."

Even if an individual has a physical or mental impairment, he or she may not be disabled for purposes of the ADA. An impairment will be considered a disability under the ADA only if it "substantially limits" one or more of the individual's major life activities.[27] Multiple impairments that combine to substantially limit a major life activity could also constitute a disability.[28]

The determination of whether a person is substantially limited must be made on an individualized basis.[29] Whether an individual has a substantially limiting disability will not necessarily be based on the title or diagnosis of the impairment, but rather on the effect of that impairment on the life of the individual.[30] The burden rests with the plaintiff to present evidence as to how his/her impairment substantially limited a major life activity.

To be considered "disabled" in the major life activity of working, an individual's impairment must result in the inability to perform a broad range or class of jobs.[31] The inability to perform a single, particular job does not constitute a substantial limitation of the major life activity of working.[32] For further discussion of the major life activity of working *see infra* Part VI, A-H. In order to constitute a substantial limitation, the impairment must significantly restrict the individual's ability to perform as compared to others with similar training, skills and abilities.[33]

1. Eleventh Circuit Rules That Driving Is Not a Major Life Activity

Chenoweth v. Hillsborough County, No. 00-10691 (11th Cir. May 10, 2001): Plaintiff Charlotte Chenoweth was a registered nurse who began working for Hillsborough County as a Utilization Review/Network Care Manager in 1995. Her duties included reviewing files of hospital patients for whom the county was financially responsible, a task which involved driving between different sites throughout the county. In January 1997, after being diagnosed with focal onset epilepsy, Chenoweth was advised by her doctor not to drive at all until she was seizure-free for six months. Although her ability to perform her job duties was not impaired, between April 1997 and early 1998, she sought accommodation from the county because of her inability to drive. She proposed that she be allowed to work two days at home and that her office schedule be variable to accommodate her transportation needs. The county agreed to eliminate her driving between different work sites, but refused her other requests. Chenoweth sued under the ADA, alleging a failure to accommodate. The court held that with regard to the argument that Chenoweth's inability to drive substantially limited her ability to work, "[i]t would at the least be an oddity that a major life activity should require a license from the state, revocable for a variety of reasons including failure to insure. We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving to a major life activity; but millions of Americans do not drive, millions are passengers to work, and deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn." While Chenoweth additionally argued that her epilepsy affected her reproductive capacity, and the court noted that childbearing is a major life activity, the court rejected the argument, noting that such an impairment had no relevance at all to her work or her request for accommodation.

2. Social Interaction May Be a Major Life Activity

Garvey v. Jefferson Smurfit Corp., 11 A.D. Cas. (BNA) 154 (E.D. Pa. Oct. 24, 2000). John Garvey worked for Jefferson Smurfit Corporation as a production supervisor at the time he was diagnosed with severe hypertension. Nevertheless, Garvey continued to work without incident until September 1997. At that time, Garvey suffered three separate dizzy spells while at work. Because of these incidents, Garvey's doctor advised him not to work the evening shift. To accommodate these restrictions, Jefferson created a temporary position supervising a corrugator machine. Following a severe car accident and a leave of absence, Jefferson notified Garvey that the temporary position he had been filling would be dissolved and his employment terminated.

Following his termination, Garvey filed suit, alleging discrimination in violation of the ADA. Garvey alleged that his hypertension constituted a disability within the meaning of the ADA. The court, however, disagreed. The court reasoned that inasmuch as Garvey could, and in fact did, continue to work 40 hours per week with his hypertension, he was not substantially limited in the major life activity of working. Nevertheless, the court found that social interaction is a major life activity. This activity of social interaction, moreover, may have been substantially impaired by Garvey's hypertension in light of evidence that anytime Garvey became involved in a stressful social situation or argument, his blood pressure rose to dangerous levels. Accordingly, Garvey presented a triable issue of fact as to whether he was disabled under the ADA.

3. Recreational Activities Are Not Major Life Activities

Lukens v. National R.R. Passenger Corp., No. 99-4102, 2000 U.S. Dist. LEXIS 15979 (E.D. Pa. Oct. 25, 2000). Kenneth Lukens was employed as a field technician train rider. Lukens was responsible for maintaining the electrical systems on trains, including air conditioning, refrigeration, heating, battery chargers, and wheel sensors. The job required him to ride the train to maintain the

locomotive and mechanical equipment. As a result of various injuries suffered during the course of his employment, Lukens endured a ruptured tendon, a torn rotator cuff, and adhesive capsulitis. Consequently, he could not lift more than 20 pounds and had no functional use of his left arm above the shoulder level.

In late 1998, the railroad abolished the electrical technician position and Lukens was laid off. When his application to "bump" a junior employee pursuant to union rules was denied, Lukens filed suit alleging disability discrimination.

The court found because recreational activities are not major life activities, Lukens' inability to swim, to lift his grandchildren, or to embrace his family were not major life activities. Similarly, the court held that neither sexual intimacy nor sleeping constitute major life activities. Consequently, Lukens' inability to accomplish any of these tasks did not render him disabled within the meaning of the ADA.

Nevertheless, Lukens also testified that he was unable to dress himself and to maintain his hygiene. In addition, Lukens could not lift objects greater than 20 pounds. Both of these activities, according to the court, constitute major life activities. Consequently, because Lukens was unable to accomplish these tasks, he was substantially impaired and therefore disabled under the ADA. The court therefore denied the railroad's motion for summary judgment.

4. Neither Housekeeping Chores Nor Recreational Activities Are Major Life Activities

Sharkey v. Federal Express Corp., No. 98-CV-3351, 2001 U.S. Dist. LEXIS 72 (E.D. Pa. Jan. 9, 2001). Federal Express hired Thomas Sharkey in May 1988 as a courier. As part of this job, Sharkey was responsible for driving a company truck to customer sites and picking up and delivering packages. In January 1997, Sharkey began experiencing shortness of breath and chest tightness. Because of a history of heart disease, Sharkey was admitted to the hospital. After five days of hospitalization, Sharkey was released. Nevertheless, he did not return to work, opting instead to seek disability benefits. In light of his consistent failure to return to work, Federal Express terminated Sharkey's employment.

Sharkey brought suit, alleging discrimination and claiming that Federal Express had an obligation to find other work for him consistent with his work restrictions. The court, however, rejected these claims on the grounds that Sharkey was not a qualified individual with a disability. In asserting himself to be disabled, Sharkey pointed to his inability to cut his lawn, wash his car, and play racquetball. The court determined, however, that neither the housekeeping chores nor the recreational activities enumerated by Sharkey constituted a major life activity. Consequently, he presented no evidence that he was substantially limited as to one or more major life activities and the court accordingly granted summary judgment in favor of the employer.

B. Record of An Impairment

An individual with a record of an impairment that substantially limits a major life activity will also be considered disabled under the ADA.[34] Significantly, however, individuals with a record of an impairment are not entitled to reasonable accommodation on that basis.[35] ***But see Davidson v. Midelfort Clinic Ltd.***, 133 F.3d 499 (7th Cir. 1998) (court stated that an employee with a record of a learning disability may demand reasonable accommodations to *ongoing or recurrent* limitations). Also included within this definition are individuals who are no longer engaged in the current illegal use of drugs and have either successfully completed a drug rehabilitation program or are currently participating in such a program.[36]

This definition also includes individuals misclassified as having a disability,[37] or individuals who have been classified as disabled veterans or provided with disability retirement from other positions.[38] In order for individuals classified as "disabled" for some other purpose also to be considered disabled under this section of the ADA, their prior record must show an impairment that substantially limits one or more major life activities.[39]

C. Regarded By Others As Having An Impairment

Persons regarded by an employer as having an impairment that substantially limits a major life activity are also considered disabled under the ADA.[40] An individual may satisfy the definition for "being regarded as having a disability" in one of three ways:

1. An individual may have an impairment which is not actually substantially limiting but is so perceived by the employer.[41]

2. An individual may have an impairment which is only substantially limiting because of the attitudes of the employer or others (*e.g.*, customers) toward the impairment.[42]

3. An individual may not have any impairment or condition but nevertheless be regarded by an employer as having a substantially limiting impairment.[43]

Being "regarded as having such impairment" may result in conditions such as physical disfigurements, which are themselves not considered impairments, being protected under the Act.[44] It could also result in some conditions otherwise excluded from the ADA (*e.g.*, temporary illnesses) being brought under the ADA if they are "regarded" as disabilities by employers and adverse actions are taken against an individual based on that perception.[45]

IV. ELEVENTH AMENDMENT ISSUES: THE ADA AND SECTION 504

This year, the United States Supreme Court issued a significant Eleventh Amendment decision in the case of *University of Alabama Board of Trustees v. Garrett*, No. 99-1240, 2001 U.S. LEXIS 1700 (U.S. Feb. 21, 2001). The Court held, by a five-four vote, that Title I of the ADA violates the Eleventh Amendment insofar as it authorizes private damage suits against states. The majority opinion, authored by Chief Justice Rehnquist, concluded that Title I of the ADA is not a proper exercise of Congress' Fourteenth Amendment power.

The majority found two defects: (1) Congress did not compile a record sufficient to demonstrate that there was a pattern of unconstitutional state employment discrimination against persons with disabilities, and (2) even if it had, the adoption of disparate impact and reasonable accommodation provisions would not be appropriate responses to such discrimination. The majority opinion resolves any doubt whether the current court has retreated from the principles announced in the voting rights decisions from 1966 to 1980 defining Congress' Fourteenth Amendment powers. The current court unquestionably has retreated, most notably in its failure to accord the deference to Congress that was the hallmark of those decisions and in its application of heightened scrutiny to Congress' findings and remedies. The dissent in *Garrett* stated that it is "difficult to understand why the court which applies minimum rational basis review to statutes that burden persons with disabilities subjects to far stricter scrutiny a statute that seeks to help those same individuals."

The Court held that the Eleventh Amendment does not extend its immunity to units of local government, however, so these entities, such as school districts, remain subject to private claims for damages under the ADA.

With respect to the states themselves, Title I of the ADA still prescribes standards applicable to the states. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *ex parte Young*, 209 U.S. 123 (1908). The Court did not address the issue of Eleventh Amendment applicability to private causes of action brought against states pursuant to Section 504 of the Rehabilitation Act. While the Eleventh Circuit, on remand, dismissed both the ADA claims as well as the Section 504 claims, citing the Supreme Court's guidance from *Garrett* as well as *Kimmel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), it would appear that private money damages may be available pursuant to Section 504. Although not tested before the Supreme Court, Section 504 of the Rehabilitation Act enables a private individual to sue both private and governmental recipients of federal funds in federal or state court for monetary damages. All states receive federal funds and this section permits individual students to institute private employment suits against states based on claims of disability discrimination. Unlike the ADA, there is no exhaustion of remedies requirement prior to bringing your private suit under Section 504. As for remedies, the Rehabilitation Act expressly permits the court to award equitable relief and back pay as well as reasonable attorney fees to a successful private party in an action to enforce or charge a violation under Section 504. It is unclear whether compensatory or punitive damages are available against a state under Section 504, however, dicta in recent Supreme Court decisions suggests that such damages may be available against a state. *See Lane v. Pena*, 116 S. Ct. 2092 (1996).

Some interesting recent district court opinions have taken varying views as to 504's availability for private causes of action against states. In *Garcia v. Suny Health Sciences Center of Brooklyn*, ____ F.3d ____ (October 15, 2d Cir. 2001), the court considered the issue of whether a state's acceptance of federal funds constitutes a waiver of immunity under the Eleventh Amendment. The court held that such an acceptance does not constitute an actual waiver, holding that "there is a fundamental difference between a state's expressing unequivocally that it waives its immunity and Congress' expressing unequivocally its intention that if the state takes certain action such as accepting federal funds, it shall be deemed to have waived that immunity." The court held that an effective waiver of sovereign immunity requires an intentional relinquishment or abandonment of a known right or a privilege.

The court was unable to conclude that New York, in fact, waived its sovereign immunity against suit under Section 504 when it accepted federal funds. At the time that New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress' commercial clause authority. Since the proscriptions of Title II and 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so, it was actually abandoning its sovereign immunity from private damage suits since by all reasonable appearances, state sovereign immunity had already been lost. Accordingly, the plaintiff's damage claim against New York failed because New York had not knowingly waived its sovereign immunity from suit.

In a district court opinion from Delaware, *Lieberman v. State*, ____ F. Supp. ____ (Aug. 30, 2001), the court acknowledged that the state was immune from liability under Title II or I of the ADA pursuant to the *Garrett* case. The court, however, refused to dismiss the plaintiff's claim under the Rehabilitation Act, finding that the Act requires that states that accept federal funds waive their Eleventh Amendment immunity to suits brought in federal court for violations of Section 504 of the Act. It observed that pursuant to its spending clause authority, Congress can legitimately invite the states to consent to suit in exchange for federal funds. The issue of Section 504 and the Eleventh Amendment, therefore, remains subject to judicial interpretation until the Supreme Court specifically addresses this issue.

V. CONSIDERATION OF MITIGATING MEASURES

In ***Sutton v. United Airlines, Inc.***, the United States Supreme Court held that the determination of whether an individual has a disability within the meaning of the ADA must include consideration of measures which mitigate an individual's impairment, such as eyeglasses or prosthetic devices. If the mitigating measures correct an individual's physical or mental impairment so that it does not substantially limit a major life activity, the individual is not considered disabled under the ADA.

Since the ***Sutton*** decision, federal courts have aggressively applied the Supreme Court's ruling to a wide range of physical and mental impairments. These recent decisions narrow the class of individuals who are actually disabled under the ADA.

A. California Federal District Court Holds That Employee's Failure To Take Advantage of Mitigating Measures Will Not Bar ADA Claim

Capizzi v. County of Placer, 11 A.D. Cas. (BNA) 1265 (E.D. Cal. Mar. 22, 2001): Plaintiff Susan Capizzi was injured while carpeting the county library in September 1996 and was subsequently diagnosed with bilateral elbow tendonitis and was given light duty assignments. She was terminated after she took medical leave in 1998 when her treating physician restricted her from lifting more than five pounds and from repetitive overhead lifting. She sued under the ADA, alleging that the county had discriminated against her on the basis of her disability.

Ordinarily, the treatment for bilateral elbow tendonitis consists of three stages: (a) modification and anti-inflammatory medication, icing and the use of a brace or physical therapy; (b) cortisone injections; and (c) surgical treatment. Although the county introduced evidence that ninety to ninety-five percent of patients get well with traditional treatment, and eighty-five percent who undergo surgical treatment have significant, if not complete, relief, Capizzi was reluctant to undergo cortisone injections and the surgical procedure. She instead chose to undergo acupuncture and her condition did not improve. In its motion for summary judgment, the county argued that Capizzi's lack of diligence in failing to take advantage of the mitigating measures of treatment and/or surgery barred her ADA claim. The court disagreed and denied summary judgment, noting that Capizzi offered into evidence the statement of a physician who testified that, based upon his examination, he did not believe Capizzi was a candidate for corrective surgery. In light of the conflicting evidence regarding whether the mitigating measures available to Capizzi would correct her condition, the court held that whether she has been reasonably diligent was for the jury to decide.

B. Asthmatic Employee Who Failed to Take Recommended Medication Was Not Disabled

Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587 (D. Md. 2000). Plaintiff has suffered from asthma since childhood and developed a pituitary adenoma, a type of tumor which required treatment and medication. In December 1984, plaintiff was hired by the hospital as an interior design coordinator. In April 1992, she took a five-month medical leave of absence due to complications arising from her asthma. In January 1993, plaintiff was hospitalized for a severe bronchial infection and other respiratory-related ailments. During this same period, Tangires was informed by her supervisor that if she was absent again from work for an extended period, he might have to place her on a medical layoff. The hospital's medical layoff policy provided that a medical layoff "may be granted to any employee who applies for leave of absence for medical reasons but cannot be granted such leave because of a business necessity. In this context, a medical layoff may be considered for those employees no longer able to perform their job assignment in a satisfactory manner because of medical restrictions or limitations." Plaintiff's physician requested that the hospital grant plaintiff a medical leave of absence for her January 1993 hospitalization. The hospital refused and instead placed on her medical layoff. Plaintiff

sued and claimed that the hospital had violated the ADA for having been placed on a medical layoff and for the hospital's failure to provide reasonable accommodations for her disability.

The court noted that medical evidence in this case established that asthma was readily treatable and can be completely controlled with two types of medication. Although the plaintiff did, from time to time, use an inhaler and was able to obtain some relief from her breathing difficulties, she was resistant to the use of anti-inflammatory medications. Medical records relating to the treatment of plaintiff's asthma disclosed numerous refusals on her part to take medications and to follow doctors' instructions for the treatment of her condition. Several physicians who treated plaintiff testified that plaintiff's asthma would have been better controlled had she taken inhaled steroids as prescribed by her physicians. The court found that plaintiff's persistent refusal to use any inhaled steroids to treat her asthma was based on her subjective and unsubstantiated belief that such use would adversely affect her pituitary adenoma. According to one physician who treated her, plaintiff "almost went into a panic and developed very childish behavior" when he counseled her about the advantages of using anti-inflammatory medicine for her condition. The court noted that the record here indicated that there was no evidence that steroids would adversely affect plaintiff's pituitary tumor and that after her employment with defendant had been terminated, plaintiff did take steroid medication and her asthma did improve.

The court granted summary judgment for the employer and held that plaintiff's asthma was treatable and that during her employment, she intentionally failed to follow her physician's recommendation that she take steroid medication. The court found that since plaintiff's asthma was correctable by medication and since she voluntarily refused the recommended medication, her asthma did not substantially limit her in any major life activity. The court stated that "the plaintiff who does not avail herself of proper treatment is not a qualified individual under the ADA." The court concluded that since plaintiff had not presented proof that she had a disability as defined under the ADA, defendant was entitled to the entry of summary judgment.

C. Employee With Sleep-Related Seizure Disorder Was Not Disabled Because She Employed Mitigating Measures

Popko v. Pennsylvania State Univ., 84 F. Supp. 2d 589 (M.D. Pa. 2000). Plaintiff was hired as a medical technologist in 1973. Plaintiff suffered from idiopathic epilepsy, a sleep-related seizure disorder. Plaintiff treated her epilepsy by getting a regular night's sleep. When she did not sleep her normal seven to eight hours, she experienced a generalized shakiness in the morning. Due to her condition, plaintiff declined working evenings in 1995. In 1996, plaintiff received her first "below average" evaluations. Plaintiff sued, alleging the evaluations were improperly based on her disability. The district court granted the defendant's motion for summary judgment. However, the Court of Appeals remanded in light of the Supreme Court's decision in ***Sutton v. United Air Lines***.

Plaintiff alleged that her epilepsy was a disability under the ADA because the disorder interfered with the major life activity of sleeping. The court noted that while other courts have found sleeping to be a major life activity, there was no research to support the theory that a requirement of an average of seven to eight hours of sleep is somehow a "substantial limitation" of the major life activity of sleeping. Additionally, the court found that plaintiff's epileptic seizure activity did not interfere with any major life activities when she treated it by adhering to her therapeutic sleep regimen. The court therefore reaffirmed its prior determination that plaintiff was not disabled under the ADA.

D. Sales Associate May Be Disabled Despite Use of Mitigating Measures

EEOC v. Sears, Roebuck & Co., 233 F.3d 432 (7th Cir. 2000). In September 1992, Plaintiff Judith Keane began working at the Sears River Oaks department store in Calumet City, Illinois. As a sales associate in the intimate apparel department, Keane's tasks included handling purchases, assisting customers, sizing racks, and occasionally transporting money to and from cash registers. In the course of her employment with Sears, Keane also worked in other departments, including handbags, sportswear, and women's dresses. In 1994, Keane began to experience numbness in her right leg that would began toward the end of her shift. While the numbness did not impact her ability to walk short distances, it did sometimes preclude Keane's ability to reach the employee cafeteria or the food court. Ultimately, this impairment, diagnosed as a general damage to the nerves resulting from the employee's diabetes, forced Keane to begin using a cane to assist her in walking.

As a result of the numbness in her leg, Keane requested that she be able to walk through the shoe department storeroom so as to lessen the distance she was required to walk. In addition, she asked that she be permitted to park her car in the merchandise pick-up lot. The store manager denied both requests and permitted her instead to park in a handicapped parking space in the customer lot. Shortly thereafter, the manager presented Keane with a new work schedule that required her to work Thursday and Friday nights. Not being able to comply with the schedule, Keane was forced to resign. Following her resignation, Keane complained to the EEOC, which filed suit on her behalf alleging that the store's refusal to permit Keane to walk through the stockroom and to park in the pick-up area constituted a failure to reasonably accommodate her disability.

Concluding that Keane was not disabled under the ADA, the district court entered summary judgment in favor of Sears. The court of appeals reversed. In reaching its decision, the court considered whether the employee was substantially limited in a major life activity and whether that limitation continued in light of her use of a cane. The court first noted that the use of a mitigating device, such as a cane, does not automatically bar any possibility of a person being considered disabled. In the absence of any evidence of how the use of a cane affected Keane's inability to walk long distances, the court found summary judgment to be inappropriate and remanded the case for trial.

E. Receptionist with Bipolar Disorder Not Disabled Where Disorder Could Be Controlled Through Medication and Therapy

Horowitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350 (N.D.N.Y. 2000). On March 2, 1999, Horowitz was hired as a part-time receptionist. As part of the hiring process, the company required Horowitz to fill out a medical questionnaire. On that form, Horowitz indicated that she suffered from bipolar disease for which she took medication and had twice been hospitalized. She failed to answer a question, however, regarding whether she ever had a workers' compensation injury or illness or collected short-term disability benefits due to a non-work related injury. In addition, Horowitz's responses indicated at least one inconsistency. Because of this failure to fully and truthfully to complete the medical questionnaire, the company terminated Horowitz within a few days of her beginning work. Believing this action to be based on her bipolar disorder, Horowitz filed suit under the ADA.

The court rejected Horowitz's claims on the grounds that she was not a qualified individual with a disability. As the court noted, Horowitz regularly took medication and attended therapy sessions to control her bipolar disorder. After taking these mitigating measures into account, the court found that Horowitz was not substantially limited as to one or more major life activities, even though Horowitz could exhibit the symptoms of bipolar disorder when under high stress. Such lapses, however, would be brief in duration so long as Horowitz continued to take medication and attend therapy sessions. Because this medication and therapy sufficiently curtailed the debilitating effects of Horowitz's bipolarity, even

despite occasional relapses caused by stress, the court found that she was not substantially limited in the major life activities of working, caring for herself, or interacting with others. Accordingly, the court held that Horowitz was not disabled within the protections of the ADA.

F. Truck Driver's Hyperactivity Controlled Through Medication Was Not Substantially Limiting

Hein v. All Am. Plywood Co., 232 F.3d 482 (6th Cir. 2000). Wayne Hein worked for AAP for 16 years as a truck driver. His regular delivery territory was western Michigan and Toledo, Ohio. Being a 45 year-old 5'8", 200 pound truck driver, Hein predictably suffered from hypertension. His medical routine required a periodic check-up every six months at which time the doctor prescribed a six-month supply of high blood pressure medication. In July 1998, Hein was requested to make a delivery to customers in Cleveland, Ohio. AAP made the request five days prior to Hein's scheduled departure. Despite his initial agreement, Hein refused to make the delivery, notifying the company one day before his departure that he would run out of medication during the course of the journey. Because of this action, the company terminated Hein immediately.

The district court rejected Hein's claims of disability discrimination and granted summary judgment in favor of AAP. Following Supreme Court precedent, the Sixth Circuit considered whether, in light of Hein's medication, he was substantially limited as to a major life activity. Accordingly to Hein's own testimony, while on medication he functions normally and has no problems controlling his blood pressure. His hypertensive condition, when medicated, did not prevent him for performing his duties as a truck driver and therefore did not substantially limit his ability to work. Accordingly, because he was not substantially limited as to a major life activity, the court of appeals found Hein not to be disabled under the ADA. The court therefore affirmed the district court's grant of summary judgment.

G. Drug Taken as Mitigating Measure Produced Side Effects That Precluded Police Officer from Working

Gasser v. Ramsey, 125 F. Supp. 2d 1 (D.D.C. 2000). Neal Gasser was a police officer with the District of Columbia Metropolitan Police Department for over 13 years. In December 1998, Gasser sprained his wrist in an off-duty car accident. He promptly reported the accident to the police department and submitted to an examination by the police clinic as requested. Because of this injury, coupled with the requirement that he take a prescription drug (Coumadin) for a protein deficiency, the department restricted Gasser to office duties. These duties prevented him from performing overtime or obtaining work for outside employers. Accordingly, he brought suit, alleging that the work restrictions constituted discrimination in violation of the ADA.

Gasser's protein deficiency, according to the court, could be controlled by the prescribed Coumadin. The drug, however, caused the thinning of Gasser's blood which made active duty police work dangerous. Accordingly, the mitigating measure, and not the disability itself, caused the officer to be unable to work. Because such allegations were sufficient to state a claim under the ADA, the court refused to grant the City's motion for summary judgment.

VI. WHAT IS A SUBSTANTIAL LIMITATION OF THE MAJOR LIFE ACTIVITY OF WORKING

If an individual claims that an impairment is a disability because it substantially limits the major life activity of working, that individual must show that the condition limits the performance of " . . . either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable train, skills and abilities."[46]

The EEOC has indicated that a *class of jobs* would include categories such as "heavy labor jobs," "clerical jobs," or "jobs requiring the use of a computer."[47] The EEOC recently stated that "law enforcement or security positions" would constitute a class of jobs.[48] The EEOC also provided examples illustrating when a person is limited in a *broad range of jobs*. These include someone precluded (a) from jobs in many of the high-rise office buildings in their geographical area because of an allergy, (b) from working in noisy jobs such as carpentry, auto repair, heavy equipment operation, demolitions, or airport grounds work because of a hearing impairment, and (c) from working in "full-time" jobs because of a treatment for a disability.[49]

The inability to perform a single, particular job is not a substantial limitation of the major life activity of working. *See* ***Bolton v. Scrivner, Inc.***, 836 F. Supp. 783 (W.D. Okla. 1993), *aff'd*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); ***Davidson v. Midelfort Clinic, Ltd.***, 133 F.3d 499 (7th Cir. 1998) (psychotherapist with Attention Deficit Hyperactivity Disorder who could not quickly dictate notes for transcription was not substantially limited in working; ability to take notes quickly may have been special requirement of employer and may not be required by other employers of psychotherapists); ***McIntosh v. Brookdale Hosp. Med. Ctr.***, No. 96-9522, 1997 WL 606746 (2d Cir Oct. 2, 1997) (unpublished opinion) (even if employee's hypertension was "situationally induced" when she worked for the employer, that evidence showed merely that she was somehow restricted from working at Brookdale Hospital, which alone is insufficient to establish a disability).

A. Tenth Circuit Affirms Summary Judgment for Employer Where Plaintiff's Expert Witness Report Failed To Establish That Plaintiff Was Substantially Limited in the Major Life Activity of Working

Heiman v. United Parcel Serv., No. 00-3005 (10th Cir. Apr. 2, 2001): Paul Heiman, an eighteen-year employee of UPS, was terminated in December 1998. Prior to his termination, Heiman, who worked as a feeder driver, requested a less physically demanding job due to injuries he sustained over the years to his back, neck, shoulders and knees. When UPS failed to provide Heiman with a transfer, he filed suit, alleging a failure to accommodate. UPS was served with a copy of Heiman's ADA complaint in October 1998.

In November 1998, Heiman had an argument with David Larkin, a coworker at UPS. Larkin filed a written complaint against Heiman. When Heiman met with his supervisors and a union steward to discuss the incident, Heiman was initially told he could continue to work at UPS pending further investigation, but he was to avoid contact with Larkin. When Heiman became frustrated during the meeting and repeatedly asked for a copy of Larkin's complaint, he was told by both his supervisor and the union steward to "calm down." After several requests, Heiman's supervisor told him he was too confrontational and that he would be removed from service pending further investigation. On December 2, 1998, Heiman received UPS's termination letter, noting the incident with Larkin and his behavior during the investigatory meeting as the reasons for his termination. After the termination, Heiman amended his complaint to include a charge of retaliation. The district court granted UPS's motion for summary judgment on the grounds that Heiman's evidence, *i.e.*, a report from a vocational expert, failed to show he was substantially limited in the major life activity of working. In addition, the court held that Heiman failed to establish a *prima facie* case of retaliation because he failed to show a causal connection between his protected activity and termination.

In affirming summary judgment for UPS on the failure to accommodate claim, the court first noted that the only evidence Heiman produced to indicate that he was substantially limited in the major life activity of working was a report from a vocational expert which concluded that Heiman, due to his injuries, had "lost the ability to perform approximately 30% of the jobs he might normally have been able

to access prior to his injuries incurred at [United Parcel]." The court first noted that the 30% figure was particularly unhelpful where the number of jobs Heiman was disqualified from was not provided. The court also rejected the expert's report on the grounds that it was based on an incomplete vocational assessment, stating that it would not accept the expert's "conclusory dismissal" of Heiman's college degree "because he never used the degree, or because the degree was 'not current' and would be 'difficult to use.'" The court held that "Heiman must be compared to "the average person having *comparable training, skills and abilities* . . . [and that] [i]n this instance, we must compare Mr. Heiman to an average person possessing a college degree in art."

With regard to Heiman's retaliation claim, both parties relied heavily on the temporal proximity question. The court noted that although UPS was served with Heiman's complaint in October 1998, he filed suit in June 1998 and previously filed his EEOC charge in June 1997. Citing to case law, the court held that protected activity is the "bringing of charges" rather than the serving of a lawsuit or receipt of an EEOC charge. Because on summary judgment the court must use the filing date most favorable to the plaintiff, the court held that Heiman's protected activity occurred when he filed his lawsuit in June 1998. The court then held that an intervening period of six months is not sufficiently "close temporal proximity" to raise an inference of causation based on timing. Because Heiman produced no other viable evidence of pretext, summary judgment was affirmed on his retaliation claim.

B. Employee Not Substantially Limited Where Impairment Only Prevented the Completion of a Narrow Range of Tasks

Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000). Ishaq Chanda began working as a professional engineer technician at Ceiba-Geigy Corporation in 1990 and in 1993 was promoted to shift supervisor in the production department. As a supervisor, Chanda was responsible for the research and development of different materials used by the corporation, drafting facility lay-outs, and building prototypes. In March 1994, Chanda was reassigned as a quality control technician. The position required the cutting of various widths of honeycomb foam board that was previously performed by five workers. Deposition testimony indicated that the reassignment was part of a concerted effort to assign Chanda impossible tasks in an effort to force his resignation. In attempting to perform these tasks, Chanda developed myositis, an inflamation of the wrist and forearm. After consistently refusing to move Chanda to another position despite repeated requests, the company terminated Chanda in November 1995.

The district court granted the employer's motion for summary judgment and Chanda appealed. The court of appeals affirmed on the grounds that Chanda was not substantially limited in the major life activity of performing manual tasks and was therefore not disabled under the ADA. According to the court, in order to prevail a employee must demonstrate that he is substantially limited in a range of manual tasks rather than a narrow category. Chanda's only restrictions that were severe, of lengthy duration, and with a long term impact were related to a narrow category of tasks, such as typing or cutting foamboard for an extensive period of time. He acknowledged, however, that he could perform daily activities, including dressing himself, driving, and attending classes or working in a position requiring computer usage. Accordingly, the court found that his limitations were not so broad as to substantially limit any major life activity and therefore he was not a qualified individual with a disability.

C. Inability To Work One Particular Job Does Not Make Caseworker Disabled

Comber v. Prologue, Inc., 11 A.D. Cas. (BNA) 72 (D. Md. Sept. 28, 2000). Kathleen Comber was employed by Prologue to work with mentally ill clients in various capacities from 1994 until her discharge in November 1998 following an altercation with her supervisor. During her employment with Prologue, Comber suffered from autism spectrum disorder. This disorder affected Comber's ability to learn, read, see, interact with others, and to breathe. In addition to this, Comber claimed that her

disabilities included asthma with multiple chemical sensitivities, scotopic sensitivity syndrome, learning disabilities, anxiety disorder, and depression.

Despite all of these varied impairments, however, the court held that Comber was not substantially impaired in the major life activity of working as she could not identify a class of jobs that she was precluded from performing. Moreover, Comber's inability to work with one particular supervisor at her particular job did not rise to the level of a disability within the meaning of the ADA. Accordingly, Comber failed to identify any substantial limitation and therefore could not be deemed to be disabled within the ADA.

D. Employee Must Present Comparative Evidence To Prove Substantial Limitation

Maynard v. Pneumatic Prods. Corp., 233 F.3d 1344 (11th Cir. 2000). Pneumatic Products Corporation hired Donald Maynard in 1991 as an assembly line worker on Pneumatic's filter product line. In 1994, Maynard sustained an on the job injury in which he herniated a disc in his back. By March 1996, Maynard could not lift more than 14 pounds, sleep sufficiently, sit in a chair for more than 15-20 minutes, bend at the waist, run up stairs, or walk more than 50 yards at a time. Pneumatic terminated Maynard's employment in March 1996 because it was discontinuing the product line on which Maynard worked. Citing his back injury, Maynard brought suit, alleging disability discrimination.

At trial, the district court granted Pneumatic's motion for directed verdict and Maynard appealed. The court of appeals affirmed the grant of directed verdict on the grounds that no reasonable juror could find Maynard to be a qualified individual with a disability because Maynard failed to present any comparison between his ability to walk and that of the average person in the general population. Accordingly, he could not recover under the ADA.

E. Bus Driver with Polycystic Kidney Disease Which Periodically Flared Up Was Not Disabled

Irby v. New York City Transit Auth., No. 99 CIV. 2172, 2000 U.S. Dist. LEXIS 15822 (S.D.N.Y. Oct. 26, 2000). The Transit Authority hired Carolyn Irby as a bus operator in January 1991 and initially assigned her to the 146th Street Depot. In August 1997, Irby entered into a stipulation placing her on probation for one year due to her excessive absenteeism. In October of that year, Irby was again charged with excessive absences and given "one final opportunity to improve." Apparently her attendance record did not improve and the Authority terminated Irby in January 1998. Claiming that she suffers from polycystic kidney and liver disease that causes her to be absent from work due to diarrhea and fatigue, Irby brought a discrimination suit under the Americans with Disabilities Act.

The court recognized that in order to fall within the class of individuals protected by the ADA, a employee must be a qualified individual with a disability. The court noted that among the factors to be considered in deciding whether an individual is substantially limited in a major life activity are the nature and severity of the impairment, the duration of the impairment, and the permanent or long term impact of the impairment. According to the undisputed evidence presented in the case, Irby's symptoms appeared only for two to three days every month, commonly during her menstrual cycle. Because Irby's kidney and liver dysfunction manifested itself on such an occasional basis, the court held her not to be substantially impaired and therefore not a qualified person with a disability. Consequently, the court entered summary judgment in favor of the employer.

F. Transitory Impairment Is Not a Disability

Fagan v. United Int'l Ins. Co., 11 A.D. Cas. (BNA) 810 (S.D.N.Y. Jan. 22, 2001). Leland Fagan worked for United International Insurance as an insurance investigator. Two weeks after he was hired, Fagan was involved in a car accident while working for United. As a result of this accident, Fagan was forced to undergo surgery on his left knee. Fagan informed United that he would be able to return to work in late July 1998. Fagan, however, provided no medical documentation regarding his ability to do the tasks associated with the job. Consequently, United terminated Fagan in June 1998.

In rejecting Fagan's claim, the court focused on whether Fagan was substantially limited as to one or more major life activities. According to the court, a transitory impairment is not considered substantially limiting. Even under Fagan's version of events, he had nothing more than a temporary inability to work after his surgery. Such a temporary condition is not substantially limiting and therefore does not constitute a disability under the ADA. The court therefore granted summary judgment to the employer.

G. Purchasing Agent with Chronic Fatigue Syndrome Not Substantially Limited in the Major Life Activity of Working

Durley v. APAC, Inc., 236 F.3d 651 (11th Cir. 2000). Cathy Durley brought suit against her employer, APAC, Inc., alleging discrimination in violation of the ADA. Prior to her placement on long-term disability in 1995, APAC employed Durley at their Plant Services Division. Originally hired as a secretary, APAC promoted Durley to assistant purchasing agent in 1984. As part of that job, Durley performed accounting functions and assisted with purchasing. She was subsequently diagnosed with chronic fatigue syndrome, but continued to work. In 1994, following the retirement of her supervisor, Durley applied for the position of purchasing agent. Despite the fact that she had performed the functions of a purchasing agent during her supervisor's absences, however, Durley was passed over for the promotion. Because of this, she filed suit, alleging discriminatory failure to promote.

Affirming the district court's grant of summary judgment, the court found that far from being substantially limited in the major life activity of working, Durley was able to perform the job. Indeed, as Durley herself testified, at all times she was able to perform her job and complete her assignments. Accordingly, she was not a qualified individual with a disability.

H. Typesetter's Brief Seizures Were Not Substantially Limiting

Cash v. Smith, 231 F.3d 1301 (11th Cir. 2000). Brenda Cash worked as an independent contractor providing typesetting support for the graphics department of the Alabama Power Company's print shop. By 1989, the company decided to bring Cash in-house and she accepted full-time employment in the print shop where she continued to do typesetting work for the next four years. In 1993, Cash's duties broadened to include providing administrative support within the print shop, such as handling the billing records and employee time sheets. She performed these increased functions despite suffering from a variety of maladies, including mitral valve prolapse, migraine headaches, depression, high blood pressure, and the removal of a brain tumor. Finally, in 1997, Cash was diagnosed with seizure disorder and adult onset diabetes.

Because of these disorders, Cash began missing work frequently. By the end of 1997, she had completely exhausted all of her paid sick leave and vacation time for the year. In 1998, the power company removed Cash from her position and transferred her to the position of a typesetter. Because of this change, Cash applied for an open position as a print specialist. The company, however, declined to

hire her for the position. Because of this failure to transfer her to the print specialist position, Cash brought suit under the Americans with Disabilities Act.

The district court entered summary judgment for the power company, and Cash appealed. Affirming the grant of summary judgment, the Eleventh Circuit focused its inquiry on whether Cash's various medical problems rose to the level of a disability. The court found her seizure disorder was not substantially limiting. According to the court, Cash's seizures were brief in duration and normally occurred only at night. During a seizure, Cash would become briefly incapacitated but could resume normal activity upon its conclusion. Given these facts, the court found no major life activity that would be substantially limited, and that she was not a qualified individual. Accordingly, the court found her not to be a qualified individual with a disability within the protections of the ADA.

I. Employee Not Substantially Limited When She Is Able To Perform, Without Accommodation, A Job That Is Substantially Similar To The One In Which She Claims Discrimination

Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli. P.C., 258 F 3d 30 (1st Cir. 2001). Whitney sued her former employer, a Worcester accounting firm, for disability discrimination. Whitney had worked as the executive assistant to an accountant since 1988. After being diagnosed with ovarian cancer, Whitney was treated with chemotherapy in the early months of 1995, during which time she took a leave of absence from the firm. Upon her return, Whitney resumed her regular duties, which she performed without incident for more than a year. In 1996, the accounting firm adopted a new computer operating system and Whitney struggled unsuccessfully to learn the new software program. That September, she suffered an anxiety attack, which prompted a second leave of absence, during which she was diagnosed as having dementia due to the chemotherapy administered some eighteen months earlier. When Whitney returned to work for the second time, in November 1996, she was greeted with a less than favorable reception: her requests to work part-time or to adjust her hours were denied, and she received an unflattering job evaluation. Whitney's duties were also restricted. She was no longer entrusted with managing client assets and was denied access to the vault. Several weeks later, on December 26, 1996, she was fired. Less than three weeks after her termination, however, Whitney secured a full-time position as secretary to the vice president of a bank, where she performed many of the same administrative duties as she had with the accounting firm. By March 1997, Whitney's doctor reported that her condition had "significantly improved" such that she was "able to function at a reasonable capacity."

The First Circuit noted that in order to prevail on her disability discrimination claim, Whitney would have to establish that her cognitive impairment was profound enough and of sufficient duration, to hamper her ability to work or to learn. The court concluded that Whitney failed to meet this burden. In order to demonstrate a substantial limitation where work is at issue, a "plaintiff must show that she is significantly restricted in her ability to perform 'a class of jobs' [or] . . . 'a broad range of jobs in various classes.'" This burden cannot be met where a plaintiff is able to perform without accommodation a job that is substantially similar to the one in which she claims discrimination. The First Circuit held that "Whitney presented no evidence that her deficits significantly restricted her ability to perform either a class of jobs or a broad range of jobs in various classes." The court noted that Whitney satisfactorily completed as a bank secretary the same types of administrative duties for which she had been responsible at GRK&B. Similarly, the court held Whitney's claim that her major life activity of learning was also substantially limited was belied by the record. The evidence was insufficient to show that Whitney's impairment endured long enough or was severe enough to have much of a long-term impact on her ability to learn. Because Whitney's cognitive impairment was mild, reversible, and short lived, no reasonable jury could conclude that it substantially limited her ability to work or to learn.

J. Newspaper Reporter With Hand Condition Not Substantially Limited in Major Life Activities of Working and Performing Manual Tasks

Thornton v. McClatchy Newspapers, Inc., 261 F. 3d 789 (9th Cir. 2001). Jacalyn Thornton began her career with The Fresno Bee in 1973. In 1997, Thornton was released to return to work under the following restrictions: (1) continuous keyboard use limited to 30 minutes per day; (2) continuous hand-writing limited to 5 minutes per day; (3) intermittent keyboard use limited to 60 minutes per day; and (4) intermittent hand-writing limited to 60 minutes per day. Despite these restrictions on keyboarding and handwriting, Thornton was able to perform a wide range of daily tasks. Thornton continued to walk two miles each morning, prepare two to three meals a day for herself and her family, shop for groceries, and make beds. The Fresno Bee considered various options for accommodating Thornton, including voice recognition technology and reassignment to different positions. However, it concluded that none of those options were viable, and that Thornton's physical conditions rendered her unable to perform the job of reporter. Thornton was terminated and he filed suit. The district court granted the newspaper's motion for summary judgment, concluding that Thornton was not disabled and that, although Thornton had some moderate difficulties, they did not rise to the level of "substantial limitations" required by the ADA.

Thornton argued that she was substantially limited in the major life activities of "working" and "performing manual tasks." The newspaper presented evidence of Thornton's level of education, her acceptance into the teaching pool at Fresno State, and her work as a freelance journalist during the litigation, all of which, the Ninth Circuit held, suggested that she was not substantially limited in the major life activity of working. The court also noted that Thornton failed to present evidence of the jobs from which she was precluded and of the relevant labor markets for that class of jobs.

Thornton also contended that she was "substantially limited" in the major life activity of "manual tasks." However, Thornton could perform "a broad range of manual tasks, including cooking, caring for herself, grocery shopping and light housework." The Ninth Circuit stated that as such, her inability "to perform a narrow range of activities . . . does not constitute a 'substantial limitation' on performing manual tasks." Thornton's inability to type and write for extended periods of time was not sufficient to outweigh the large number of manual tasks that she could perform.

VII. "REGARDING" INDIVIDUALS AS DISABLED

A. Sending a "Get Well" Card Does Not Establish Employer Regarded Employee As Disabled

Taylor v. Nimock's Oil Co., 214 F.3d 957 (8th Cir. 2000). Taylor was hired as a cashier in 1989 at Nimock's convenience store, and became a head cashier in 1995. In November 1995, she suffered a heart attack and was hospitalized. The company sent her a "get well" card in late 1995. Taylor was released to return to work in December 1995 with certain restrictions. In January 1996, she was offered her position of head cashier but she declined and stated that her doctor told her to only perform cashier work. The company suggested that she return when she had a full release. In March 1996, Taylor received a full release and requested her old job back. However, the company had no cashier or head cashier positions open. From March to August of 1996, she was not offered a position at the convenience store even though the company hired several other new cashiers during those months. Taylor was terminated in August 1996. She sued, alleging violations of the ADA. The district court granted the company's motion for summary judgment and held that the Taylor failed to establish that she was disabled. Taylor appealed.

The Eighth Circuit rejected Taylor's argument that she was substantially limited in the life activities of breathing, walking, doing yard work, cleaning house, and having sex, even though she could

do all activities when done in moderation. The court concluded that her limitations were moderate and therefore did not qualify as substantial limitations on a major life activity. Additionally, the court concluded that an employer's knowledge that an employee may be having medical difficulties and expressing concern (whether through an offer of medical leave, or by sending a "get well" card) was insufficient to establish that the employee was "regarded as" having a permanent disability that substantially limited a major life activity.

B. Airline May Have Regarded Ramp Serviceman Suffering from Alcoholism As Disabled

Zakaras v. United Airlines, Inc., 121 F. Supp. 2d 1196 (N.D. Ill. 2000). Zakaras began his employment with United in 1964 as a Ramp Serviceman at Chicago's O'Hare International Airport. Following his return from service in Vietnam, United promoted Zakaras to a management position as a Ramp Services Supervisor. Zakaras, an admitted alcoholic, was demoted from his management position. During his 36 years of employment with United, he never consumed any alcohol while at work and was never under the influence of alcohol while at work. Moreover, he was never found to be intoxicated off the job while in uniform or on company property. Nevertheless, United demoted Zakaras allegedly because of comments made to other employees and his intoxication at a bar after a company retreat.

Zakaras sued, and alleged that United's demotion constituted discrimination on the basis of his alcoholism. United moved for summary judgment. The court, however, denied United's motion, finding that a triable issue of fact existed as to whether the airline regarded him as disabled. The record revealed that the employee's supervisors perceived him to be incapable of performing any job that required Zakaras to supervise other employees. Because the airline regarded Zakaras as disabled, the court concluded that he must be considered to be a qualified individual with a disability under the ADA.

The court, moreover, found that there were serious questions about the veracity of United's proffered reasons for the demotion. Specifically, the court considered it significant that the airline's Director of People Services recommended against the demotion. In light of this punishment, acknowledged to be excessive by the director of human resources, the court found a genuine issue of material fact as to whether United's stated reasons were not the real reasons for the demotion, but rather a pretext for discrimination.

VIII. RECENT COURT GUIDANCE ON DISABILITY CONDITIONS

A. Vision

1. Police Officer With Visual Impairment Was Not Disabled

Ditullio v. Village of Massena, 81 F. Supp. 2d 397 (N.D.N.Y. 2000). Plaintiff worked as a police officer with the Village of Massena Police Department. On July 13, 1995, plaintiff was in a car accident while driving to work and sustained a severe laceration to his right eye. In November 1995, plaintiff returned to work on limited desk duty and was prohibited from handling a firearm or driving a vehicle. In January 1996, plaintiff was medically cleared to drive without limitation. Plaintiff requalified with his service weapon in May 1996, and sought a return to road patrol duty. In October 1996, the department requested plaintiff's medical release authorization, which he refused to provide. Without the release, the department was unable to determine whether plaintiff could safely perform road patrol duties. Therefore, the department prohibited him from returning to that position. Subsequently, plaintiff sued for disability discrimination and retaliation in violation of the ADA. Both sides moved for summary judgment.

Because plaintiff's visual impairment did not prevent him from performing daily life activities as compared to the average person in the general population, the court found that he was not substantially limited in the major life activity of seeing. Additionally, plaintiff's alleged inability to perform road patrol duties was insufficient to establish that he was substantially limited in the major life activity of working. Because plaintiff was still employed by the department as a police officer, the court held he had not been regarded as incapable of performing a class of jobs or a broad range of jobs. Therefore, summary judgment was granted for the department as to plaintiff's disability discrimination claim.

B. Serious Medical Conditions

1. Seventh Circuit Holds That Mildly Retarded Employee Was Properly Terminated and Refused Rehire Into Another Job Because of Poor Job Performance

Lowery v. Hazelwood School Dist., 11 A.D. Cas. (BNA) 1057 (7th Cir. Mar. 27, 2001): As a result of a childhood bout with polio, plaintiff John Lowery had a partially paralyzed left arm and an IQ of 65, diagnosed as mild mental retardation. Despite the fact that his impairments left him unable to perform some physical and mental tasks, Lowery had been employed by the school district as a security officer for twelve years at the time of his termination. In the 1996-97 period, three serious incidents occurred. At the end of the 1996 school year (the two weeks before graduation being known as "prank season"), Lowery discovered a break-in at one of the district buildings and against district policy, entered the unsecured building and remained there for several hours until another officer came on duty. Lowery was suspended for four days and at that time, made a verbal request to be transferred to the custodial department. In September 1996, Lowery failed to discover a break-in at another district building because he failed to check that building, as well as five other buildings assigned to him. In June 1997, another break-in occurred where seventeen pranksters removed a twenty-foot section of railing where it was bolted to the floor and carried it to a nearby apartment complex. Lowery was terminated after he failed to discover the break-in, even though the perpetrators had to have been in the district's building for "some hours." A month after his termination, Lowery applied for a custodial job with the district, but he was not hired. The district court granted summary judgment for the district, holding that Lowery had not established a prima facie case of discrimination nor demonstrated that the school district's rationale for firing him, namely poor performance, was pretextual.

The Eighth Circuit affirmed, holding that the evidence Lowery presented was insufficient to support an inference of discrimination relating to his termination. Although Lowery presented evidence that someone from the district may have added negative comments ("dumb" and "bullhead") to his application for a custodial job, the record demonstrated that Lowery was not rehired because he had just been terminated for poor performance, and not because of anything on his application. Additionally, the court rejected Lowery's assertion that the district failed to accommodate him by moving him to the custodial department after the 1996 incident resulting in a suspension. The court noted that a request for accommodation must be sufficient to convey to the employer that the employee is requesting that his disability be accommodated. Lowery's 1996 request for a transfer was apparently a response to his suspension, and he did not argue that he needed an accommodation for his disability. Moreover, the court held, because Lowery argued that he was capable of performing the essential functions of the security position, he could not argue that he was entitled to any accommodation.

2. Senior Account Executive with Colon Cancer Did Not Meet Employer's *Bona Fide* Job Expectations

Robin v. Espo Eng'g Corp., 200 F.3d 1081 (7th Cir. 2000). Plaintiff, a senior account executive with a history of colon cancer, alleged age and disability discrimination. The district court

found that the plaintiff did not establish a *prima facie* case because he did not provide evidence that his job performance met the employer's *bona fide* job expectations at the time of termination. The court also stated that the plaintiff failed to request an accommodation; therefore, the employer had no duty to accommodate the employee. The district court granted summary judgment in favor of the employer and the employee appealed both claims.

The Seventh Circuit affirmed the grant of summary judgment in favor of the employer on both causes of action. The court held that when an employer's *bona fide* job expectations are in good faith without fraud or deceit, it is the court's duty to merely determine if the employee has met those employment expectations. The court concluded that even though the plaintiff had met the minimum requirement of sales during a certain year, he failed to meet the employer's expectations for a senior account executive. The court also held that the employer's statement–that firing the plaintiff while sick would "get them into trouble"– was insufficient to create a material issue of fact. The court reasoned that mere awareness of one's legal obligations was not enough to support an inference of intentional discrimination and the alleged comments did not create direct evidence of discrimination. The court concluded that: (1) the employer's statements concerning the plaintiff's illness; (2) his negative performance reviews; (3) the employer's offer of a leave of absence without a guarantee of return; and (4) the assignment of a higher sales quota, despite plaintiff's illness, were all insufficient to establish that the employer's reason for terminating the plaintiff was pretextual. The Seventh Circuit affirmed the grant of summary judgment in favor of the employer.

3. Employee With Morbid Obesity Was Not Impaired

Coleman v. Georgia Power Co., 81 F. Supp. 2d 1365 (N.D. Ga. 2000). Coleman was employed as a fleet mechanic since 1973. As a fleet mechanic, he was sometimes required to use aerial lift devices which had a 300-pound safety rating. In June 1995, the company implemented a Weight Guideline which mandated that employees working with the aerial lift device weigh 280 pounds or less. In July 1995, Coleman weighed 343 pounds and was placed on a medically-supervised diet and exercise program. In accordance with the program, he reduced his weight from 343 to 278 pounds by May 1996. However, when he weighed in at 296 pounds in October 1996, he was terminated for failure to comply with the Weight Guideline. Coleman sued, alleging violations of the ADA.

The court held that in order for obesity to be an impairment under the ADA, it must not only affect a bodily system but must also result from a physiological condition. Testimony from both Coleman and his physician failed to establish that he had any medical condition that explained his overweight condition. The court therefore held that he failed to meet his burden of showing that his morbid obesity was an impairment. The court also noted that even if Coleman could establish that he had a record of a disability because he had been obese since 1980, he failed to establish that he was substantially limited in a major life activity. The court therefore granted the employer's motion for summary judgment.

4. Epileptic Employee Unable to Perform the Essential Functions of Position Was Not Qualified

Swartz v. McDonald's Corp., 87 F. Supp. 2d 863 (N.D. Ind. 2000). Swartz suffered from grand mal seizures for about twenty years. She began employment in 1987 as a drive-thru cashier/order taker. However by 1993, her eyesight had deteriorated and she could no longer perform her cashier duties. The company created a general support staff position for her. She continued to suffer severe daily seizures, and was permitted to identify the days she could work, take time off as she needed, and call in when she wanted to be placed back on the schedule. By 1993, her condition worsened, and included symptoms such as depression, posttraumatic stress disorder, headaches, pseudoseizures, hypertension, and

a limited ability to cope with stress. In June 1996, she was hospitalized for several weeks following a suicide attempt. She returned to work in September 1996. The company subsequently terminated her for job abandonment. She sued, and alleged that the company violated the ADA.

The court granted summary judgment to the company because Swartz could not establish that she was a qualified person with a disability. The court held that even though the company had permitted her to perform less than all the essential functions of her position, she was still not qualified under the ADA because she could not perform *all* of the essential functions of her job. The court observed that the ADA does not require an employer to create a position for a disabled employee. However, when the employer does so, it is not required to continue providing the accommodation.

5. Plaintiff With Tourette's Syndrome Whose Symptoms Were Periodically Exacerbated By Work Pressure May Be Disabled

Lanci v. Arthur Andersen, L.L.P., 10 A.D. Cas. (BNA) 1004 (S.D.N.Y. 2000). Lanci was diagnosed in grade school with Tourette's Syndrome ("TS") which caused him to suffer from facial tics, neck and trunk rotation, and low audible grunts. He also suffered from related problems, such as obsessive-compulsive disorder ("OCD"), panic attacks, and depression. Through medication and accommodations, plaintiff excelled in his studies and graduated from college. In September 1991, the employer hired him as a staff tax accountant. Everyone in the office knew Lanci had TS. In 1994, he was promoted to senior accountant. However, the company maintained that Lanci had difficulty handling several projects at once and often lost his composure when under pressure. In 1995, he began to have serious obsessions that interfered with his ability to concentrate. These exacerbated symptoms continued for several months, and his work suffered. Lanci requested an accommodation. Instead, the firm terminated him in accordance with their "up or out policy." He sued, alleging violations of the ADA for the company's failure to accommodate his TS.

The court concluded that Lanci's ordinary, day-to-day symptoms did not constitute a disability; however, the court found a genuine issue of fact as to whether he had a disability when his symptoms became exacerbated. The court noted that while his TS did not warrant a disability determination, his TS, coupled with the OCD, caused a flurry of aggravated symptoms. The EEOC guidance provides that an individual can be "disabled" when two or more impairments exist that are not substantially limiting by themselves, but that together substantially limit a major life activity. The court also found that while medication alleviated his symptoms, the drug made him jittery and very drowsy. Additionally, the court noted that his aggravated symptoms appeared to exist for only a temporary period, and that temporary disabilities did not constitute an ADA-recognized disability. However, the court noted that his impairment was recurring and that the latest episode lasted longer than three or four months. The court therefore concluded that summary judgment was improper on the issue of whether Lanci's exacerbated symptoms associated with his TS constituted a disability.

6. Accountant With Heart Condition Was Not Disabled

Menes v. CUNY Univ. of New York, 92 F. Supp. 2d 294 (S.D.N.Y. 2000). After twenty-eight years as senior accountant for the Commodity Futures Trading Commission, Menes began employment with CUNY as a college accountant in September 1994. In April 1995, he had quadruple bypass surgery and was subsequently out on medical leave. His psychiatrist kept him out of work until September 1995 for post-surgery depression. Upon his return to work, he requested a three-day work week and a transfer to a college nearer his home to reduce travel time. CUNY granted his three-day work week request, but denied the transfer request. In June 1996, he received a poor evaluation and was returned to a five-day work week. He continued receiving poor evaluations until his termination on November 26, 1996. Menes sued, alleging violations of the ADA.

Menes argued that his heart condition and related chest pains substantially limited his major life activities of walking, working and commuting to work. The court found that his difficulty walking uphill, his chest pains, and his shortness of breath were insufficient to establish a significant restriction in the major life activity of walking. Additionally, he failed to present any evidence suggesting his heart condition affected his work, and he failed to cite any authority for the proposition that commuting to work is a major life activity. However, the court found that his depression was a disability since his psychiatrist requested he work only three days per week. The court then noted that he failed to demonstrate what reasonable accommodation would have permitted him to perform the essential functions of his job. Furthermore, the court found that CUNY set forth a legitimate, nondiscriminatory reason--poor work performance--for his termination. For these reasons, the court granted CUNY's motion for summary judgment.

7. Electrician With Hepatitis C Not Substantially Limited in Any Major Life Activity

Reese v. American Food Serv., No. 99-1741, 2000 U.S. Dist. LEXIS 14343 (E.D. Pa. Sept. 29, 2000). From February 1994 until September 1997, American Food Service employed Dennis Reese as an electrician in its maintenance department. In late February 1997, Reese was referred by his physician for an evaluation of abnormal liver functions to a gastroenterologist who concluded that Reese suffered from chronic active Hepatitis C. After he inadvertently dropped tools into machinery on two separate occasions, resulting in the contamination and condemnation of over 100 tons of beef, the company terminated Reese.

According to the decision of the court, Reese could not establish that he was substantially limited as to any major life activity and thus was not actually disabled under the ADA. The electrician was not limited in his ability to sleep as compared to the average adult when he used medication to mitigate the symptoms of Hepatitis. Although the court recognized that individuals with the blood-borne pathogen may be limited in their ability to procreate and to engage in sexual activity, it found that Reese had presented no evidence indicating that he was limited with regard to these activities. In light of this absence of evidence regarding any substantial limitation, the court found Reese not to be disabled and accordingly entered summary judgment in favor of the company.

8. Temporary Knee Injury Not Substantially Limiting

Cormier v. Littlefield, 112 F. Supp. 2d 196 (D. Mass. 2000). In April 1988, Victor Cormier began working for the Princeton Municipal Light Department as a lineman. As part of his duties he was required periodically to climb poles, wind towers, and perform other physical tasks. In June 1996, Cormier suffered a knee injury while off duty. This injury forced the department, consistent with recommendations of Cormier's doctors, to place him on light duty assignments. Following reconstructive knee surgery, Cormier was again released to work light duty. The department, however, refused to accept Cormier's return to work on anything less than full duty. Subsequently, the department notified Cormier that there was no longer a position available for him.

The court noted that Cormier's knee injury lasted approximately seven months. Following that recovery period, he regained full motion in his knee and was able to work without restrictions. The knee injury, according to the court, was therefore temporary in nature and did not substantially limit Cormier's major life activities. Consequently, Cormier was not disabled and not within the anti-discrimination provisions of the ADA. The court therefore granted summary judgment in favor of the department and dismissed Cormier's claims.

9. Tinnitus Does Not Qualify As A Disability

Francis v. Shumpert, No. 3:00-CV-0382-H, 2001 U.S. Dist. LEXIS14415 (N.D. Tex. Aug 31, 2001). Alan Francis had a workplace accident that he claimed resulted in tinnitus, ringing in both ears. Following the accident, approximately a year and a half passed with Francis reporting to work. Francis again returned to medical leave. Francis did not return to work from May 9, 1994, through March 18, 1998. By letter dated March 18, 1998, Mervyn's terminated Francis due to the fact he had exceeded the maximum amount of leave time authorized by Mervyn's absence policy. The district court held that Francis failed to present any evidence that his alleged tinnitus qualified as an ADA-protected disability. Further, Mervyn's submitted substantial evidence supporting its contention that Francis was terminated in accordance with its one year limitation on long-term disability leave.

C. Allergies, Asthma and Multiple Chemical Sensitivity

"Multiple Chemical Sensitivity" (MCS) is alternately known as ecological illness, food and chemical sensitivity, chemical hypersensitivity syndrome, Twentieth Century Disease, or total allergy syndrome.[50] Although it affects each person differently, the condition is generally characterized by impaired cognitive functions, speech impairments, migraine headaches, nausea, vomiting, debilitating fatigue, dizziness, and shortness of breath.[51] MCS can be triggered by reactions to a wide range of substances, from industrial solvents to seemingly innocuous substances such as co-workers' deodorants, shampoos, or lotions. Less than one-half of one percent of discrimination charges have alleged MCS as a disability. Case law specifically addressing MCS conditions indicates that the claims, when considered on a case-by-case basis, will yield varying results based on the severity of the condition.

1. No Violation of ADA in Terminating Asthmatic Employee Who Violated Absence Notification Policy

Warren v. Jostens, Inc., 11 A.D. Cas. (BNA) 1117 (N.D. Ill. Mar. 19, 2001): Plaintiff Sally Warren began working for Jostens, a jewelry manufacturer, in December 1989 and until 1994, was employed in a variety of positions in belt buckle production. Warren had a history of mild asthma, and when she was transferred to the job of plater in 1994, the dusty atmosphere exacerbated her symptoms. In January 1996, a flare-up of her asthma symptoms caused her to miss several days of work and when she returned, on her physician's advice, she was transferred to another department, eventually settling into the job of watch assembler. She was restricted from performing any sandblasting, dry buffing, polishing and lacquering activities.

Although Warren suffered no problems related to her asthma after April 1996, in June 1996, she filed two workers' compensation claims for injuries she alleged resulted from her exposure to sandblasting and dry buffing. On March 3, 1997, she notified her watch team and human resources that she was intending to go to the Mayo Clinic and would miss work on March 6 and 7 and possibly Monday, March 10. However, she neither called in nor appeared for work on Tuesday, Wednesday and Thursday, March 11, 12 and 13. In accordance with Jostens' policy under which missing three consecutive work days without proper notification is grounds for termination, Warren's employment was terminated. Warren filed suit under the ADA, alleging that Jostens violated the ADA by failing to accommodate her disability and terminating her.

The court first concluded that Warren was not disabled within the meaning of the ADA, pointing to the fact that although Warren claimed she was limited in the activities of breathing, lifting, standing, and walking, as well as working, she has held a variety of jobs since her termination from Jostens and was currently engaged in aerobic activities. In addition, Warren argued that her termination

was pretextual, pointing to the fact that she told members of her watch team that she might miss additional work and that this eliminated her need to call in to report her continued absence. The court disagreed. Noting that there is a difference between telling your employer that you *may* be absent and telling him that you *will* be absent, the court held that Jostens' three-day rule was reasonable and Jostens was entitled to enforce it.

2. Employee With Multiple Chemical Sensitivity May Be Disabled

Davis v. Utah State Tax Comm'n, 96 F. Supp. 2d 1271 (D. Utah 2000). Davis began working for the Tax Commission in 1986. In June 1990, she began suffering from multiple chemical sensitivity ("MCS"). She became sensitive to strong fragrances worn by her coworkers. When smelling strong fragrances, plaintiff experienced headaches, nausea, mental confusion, and felt like her throat was closing. Through 1996, her sensitivity was not a significant problem because her coworkers cooperated by not wearing strong perfume or her supervisors moved her. In April 1996, she was moved next to a coworker who refused to stop using a strongly scented hand lotion. Instead of being moved, she was given a big fan. She finally quit in August 1996, and stated that because the fan did not keep the fragrances away, she was constantly sick and that she had been constructively discharged. Davis sued, alleging failure to accommodate in violation of the ADA.

Davis argued that her MCS was a physical impairment that substantially limited her major life activity of breathing. The employer argued that having an impairment around one coworker was not a substantial limitation. The court noted that because of her alleged MCS, she always faced the possibility of having her breathing impaired, however she could usually avoid prolonged exposure to irritants outside of work. She testified that she avoided certain stores entirely and asked to be moved when seated next to someone with strong perfume at restaurants, airplanes or at performances. The court found that her alleged MCS affected her daily life, but was symptomatic usually only at work because there she could not avoid, escape, or control her surroundings. The court therefore found sufficient evidence whereby a reasonable jury could find that Davis had a disability and denied summary judgment for the employer.

D. Alcoholism and Drug Addiction

1. Casting Supervisor Who Was Drug Free For One Month Before Discharge Was Not Entitled To Protection Under the Safe-Harbor Provision of the ADA

Quigley v. Austeel Lemont Comp., 79 F. Supp. 2d 941 (N.D. Ill. 2000). Plaintiff began working for defendant as a material handler, and was promoted to Casting Supervisor in October 1994. After missing four of ten supervisory training classes, he received a warning for missing class, drinking while on duty and contradicting a supervisor. The next month plaintiff missed work again because he was hospitalized for drug abuse. Plaintiff returned to work in August of 1997, received two additional warnings for reckless driving and constant complaining, and was subsequently terminated. Plaintiff sued, and alleged that defendant violated the ADA by terminating him because of his status as a recovering addict and because defendant perceived him as disabled.

The district court held that plaintiff was not a qualified individual with a disability. Plaintiff claimed he was disabled under the safe-harbor provision of the ADA because he successfully completed a drug treatment program and was no longer using controlled substances. The court disagreed, and explained that the ADA's safe-harbor provision was intended for long-term recovery. The court found that plaintiff was drug-free for only one month at the time of his termination, and that the short period of the recovery did not trigger the protections of the ADA's safe-harbor provision. Further, the court found that since plaintiff admitted that his drug use did not impact his work, he failed to establish

that his alleged disability substantially limited the major life activity of working. The court therefore granted the defendant's motion for summary judgment.

IX. WHO IS A QUALIFIED PERSON WITH A DISABILITY

A. Definition of "Otherwise Qualified" To Perform Essential Job Functions

A "qualified individual with a disability" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that he or she holds or desires.[52] In determining whether an individual with a disability is "qualified," the first step is to determine whether an individual satisfies the prerequisites for the position, such as educational background, employment experience, skills, licenses and other job-related requirements of the employment position.[53] The second step is to determine whether an individual who satisfies the job-related criteria can perform the essential functions of the position held or desired, with or without reasonable accommodation.[54]

If a written job description exists prior to advertising or interviewing applicants for a position, the description "shall be considered evidence of the essential functions of the job."[55] However, if individuals currently performing the job do not in fact perform the functions on the job descriptions, a review of actual work performed will be more relevant evidence than a job description.[56]

The determination of whether an individual with a disability is qualified must be made at the time of the employment decision.[57] The determination must be based on an individualized and objective analysis of the person's capabilities.[58] Further, the determination may not be based on subjective considerations or speculation about whether the individual may become unable to perform the duties at some time in the future.[59] Finally, the determination cannot be made on the basis of whether the individual will cause increased health insurance premiums or workers' compensation costs if employed or retained in a job position.[60] ***Moroney v. United Parcel Serv.***, 70 F. Supp. 2d 1267 (D. Kan. 1999) (plaintiff established that he was substantially limited in the major life activity of working by offering medical evidence and testimony that he experienced difficulty and pain when lifting heavy objects); ***Ross v. GTE Directories Corp.***, 73 F. Supp. 2d 1342 (M.D. Fla. 1999) (plaintiff's vocal cord polyps, which limited his ability to communicate in loud or dusty environments, did not constitute a substantial limitation on the major life activity of working).

1. Company Must Evaluate the Effect of Applicants' Disabilities Individually

EEOC v. United Parcel Servs., Inc., 11 A.D. Cas. (BNA) 497 (N.D. Cal. 2000). In 1995, UPS adopted a nationwide "vision protocol." This procedure set eyesight standards for its drivers of smaller UPS vehicles, which were not regulated by federal authority. In practice, anyone failing this protocol was categorically barred from any and all driving positions with no inquiry into his or her actual abilities or safety record. Following several complaints by applicants for drivers' positions with UPS, the Equal Employment Opportunity Commission filed suit against the company. In its complaint, the Commission alleged discrimination against monocular driver applicants and sought nationwide relief on their behalf.

Consistent with Supreme Court precedent, the court noted that a case-by-case individualized assessment is required to determine whether an individual is disabled under the ADA. Accordingly, the court rejected the contention that all individuals with monocular vision were disabled. Regardless of the individual limitations of the applicants, however, the court found that UPS regarded the applicants as disabled. Therefore, the ADA required UPS to undertake an individualized measure of whether each individual was qualified to perform the essential functions of the job. The company's

failure to engage in such an inquiry, opting instead to apply a per se rule of disqualification, constituted discrimination on the basis of disability and therefore violated the ADA. The court therefore directed the company to allow the plaintiff who was able to demonstrate that he was qualified to advance to the company's driver training trials.

B. Selected Court Decisions Concerning Essential Job Functions

1. Seventh Circuit Finds Regular Attendance Is An Essential Function

Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000). Jovanovic began employment as a tool-and-die maker in 1984. His duties included responding to maintenance and repair needs throughout the plant. He suffered from asthma, and was terminated after numerous warnings regarding plaintiff's high rate of absenteeism. Jovanovic sued, alleging violations of the ADA. The district court granted summary judgment in favor of the company. The court held that Jovanovic was not a qualified person with a disability because he could not perform the essential function of "regular attendance." Jovanovic appealed.

The court found that his erratic attendance record made it impossible for him to perform the essential functions of his job. While the court refused to hold that regular attendance is an essential function of every job, the court held that it was in this case because necessary maintenance and production functions could not be performed if Jovanovic was not at work. The court held that his regular attendance was an essential function of his job in order to maintain the machinery in good repair throughout the facility. The court therefore affirmed the district court's decision.

2. Attendance Is An Essential Function of Any Job

Fields v. St. Bernard Parish Sch. Bd., No. 99-3396, 2000 U.S. Dist. LEXIS 15637 (E.D. La. Oct. 16, 2000). Brenda Fields claimed that she became disabled following four separate incidents in which she was physically assaulted by students at the school where she was employed as a teacher. According to Fields, her disability was limited to being "nervous and shaky." Fields' repeated requests for leave of absence were denied because she had taken all of her allotted FMLA leave and paid time off. She therefore filed suit, alleging that this failure reasonably to accommodate her "disability" constituted disability discrimination in violation of the ADA.

The court, however, rejected her claim and held that she was not a qualified individual with a disability. While the court found there to be a fact issue as to whether Fields' claims of post traumatic stress disorder constituted a disability, the court held that her disorder made Fields unqualified to perform the essential functions of her position as a high school teacher. As several courts have recognized, an essential element of any job is the ability to appear for work and to complete assigned tasks within a reasonable period of time. Fields' consistent actions, not only in her requests for a leave of absence, but also in her applications for loans in which she stated that she was unable to work, demonstrated that she was unable to regularly appear for work. Consequently, the court found her not to be qualified for the position of teacher and therefore granted summary judgment in favor of the school.

3. Dealing With Patients Is An Essential Function of Psychiatrist's Position

Webb v. Choate Mental Health & Dev. Ctr., 230 F.3d 991 (7th Cir. 2000). Jeffrey Webb began his association with Choate in 1982 as a mental health technician trainee. Over the course of his 12 years at Choate, Webb was promoted three times, ultimately reaching the position of Psychologist I. As a psychologist, Webb performed the initial assessment of those in need of mental health services and provided group and individual therapy. Being a "direct care" position, Webb's job required direct

interaction with patients after special training as to handling patients who display unpredictable violent tendencies.

Throughout his employment, Webb suffered from severe asthma, osteoporosis, and a weakened immune system. Webb requested a variety of accommodations including a well-ventilated office and permission to attend doctors' appointments without prior notification. While the center accepted most of these requests, it specifically denied Webb's desire to be exempt from intentional contact with patients displaying violent behavior and an exemption from intentional contact with patients known to have infectious diseases. Because of this refusal to provide the requested accommodations, Webb brought suit under the ADA.

Affirming the court's grant of summary judgment, the Seventh Circuit found no evidence that Webb was substantially limited in the major life activity of working. While he could not perform the specific job that he held at the center due to its contact with infectious and potentially violent patients, Webb presented no evidence to suggest that he could not perform the class of jobs as a psychiatrist. Webb was therefore not disabled under the statute.

Furthermore, even were he disabled, Webb was not qualified for the position he held. The court acknowledged that the employer has discretion to set the essential functions of the position and therefore accepted the center's representations that interacting with infectious and potentially violent patients were essential functions of the job. Because Webb characterized himself as unable to accomplish these tasks, he was not otherwise qualified for his position as a Psychiatrist I. Accordingly, the court of appeals affirmed the decision of the district court.

4. Blind Employee Could Not Carry Out Essential Functions of Ward Clerk Position

Winfrey v. City of Chicago, 259 F. 3d 610 (7th Cir. 2001). Winfrey worked as a laborer for the Chicago Department of Streets and Sanitation. In 1977, he began to lose his eyesight, and by 1986 he was legally blind. Winfrey worked in special events. In 1991, Winfrey fell 25 feet and broke one of his legs. In early 1994, the City's doctors determined that Winfrey had recovered from the leg injury, and they issued him a release to return to work in March 1994. The City did not return him to work, however, because Winfrey had not received a release related to his visual impairment. The City contacted the Mayor's Office for People with Disabilities, which began to explore ways to accommodate Winfrey. In September 1996, the MOPD developed a revised job description for a ward clerk position for Winfrey. He began work at this newly fashioned position in December. His supervisor testified that he did not know how to accommodate Winfrey, so he allowed Winfrey to answer phones and take messages, but otherwise gave him nothing to do. Winfrey filed a lawsuit claiming that the City violated the ADA by failing to reasonably accommodate his blindness by assigning him to the positions of laborer, ward clerk or dispatcher. The City argued, and the district court held, that Winfrey had failed to meet his burden because he had failed to show that he was a "qualified individual with a disability" within the meaning of the ADA. The district court concluded that Winfrey failed to undermine the City's (Carranza's) determination that Winfrey could not perform the essential duties of the positions he sought, including distributing tickets, receiving drivers, picking up mail, ordering supplies, facilities management, and keeping attendance records.

On appeal, Winfrey contended that there was a genuine issue of fact as to whether the functions alleged by the City to be required, were in fact essential. Winfrey argued that the other ward clerks did not perform all of the functions claimed to be essential. However, the Seventh Circuit concluded that showing that not all employees perform at a particular time all the essential job functions does not make those functions non-essential. The Court noted that Winfrey failed to controvert the City's

claim that clerks must be capable of performing all the essential duties of their position, and that they may be called upon to perform any of them at any time.

5. Investigator With Multiple Sclerosis Could Not Perform Essential Functions Of Running, Engaging In Violent Activity And Carrying A Firearm

Frazier v. Simmons, 254 F. 3d 1247 (10th Cir. 2001). Steve Frazier was diagnosed with multiple sclerosis in 1987. His symptoms were relapsing-remitting, and included blurred and partially lost vision, tingling in his hands, a pinched nerve, and pain in his hip resulting in an inability to run, loss of balance, and walking with a limp. Frazier worked as an investigator for the Kansas Department of Corrections. In February 1994, Frazier provided the Department of Corrections, with a letter from his doctor explaining that he was diagnosed with multiple sclerosis. In this letter, Frazier's doctor explained that his "symptoms have progressed to the point where it jeopardizes his ability to perform his duties at work," and recommended Frazier be placed indefinitely "on light duty or a disability classification." Frazier briefly returned to work, but then took a second medical leave of absence. After exhausting his personal leave time, Frazier's supervisor agreed to allow Frazier to participate in the shared leave plan, enabling Frazier to have an extended absence from work. While on his extended leave, Frazier wrote a letter to the Human Resource Director declaring that he did "not believe [he has] or will recover enough mobility or sight in [his] right eye to return to [his] current position [as Investigator for the Department of Corrections]." Frazier was then terminated. Following his termination, Frazier sued his supervisor, in his official capacity, for violation of the Disabilities Act.

The Tenth Circuit assumed without deciding that Frazier's multiple sclerosis was a disability, and instead focused on the question of whether he was "qualified" such that he could perform the "essential functions" of his job or a job he desired, with or without reasonable accommodations. Frazier was incapable of performing certain physical activities, *i.e.*, running and engaging in violent activity. According to Frazier, the functions he could not perform were marginal to his job because they were rarely required. However, the court held that it was evident an investigator is at risk of physical harm during an investigation, and must be able to run, carry a firearm, and physically restrain offenders in order to protect himself and others, and conduct the investigation. Thus, Frazier failed to put forth sufficient evidence to create a genuine issue of material fact rebutting his supervisor's position that Frazier's job required him to perform multiple essential functions in different environments, including carrying a firearm, running, and engaging in violent activity.

6. Fact Issue Created Where Functions Described by Employer As Essential Were Not Listed As "Essential" In Job Descriptions

Skerski v. Time Warner Cable Co., 257 F. 3d 273 (3rd Cir. 2001). Larry Skerski worked as a cable service technician installing and disconnecting cable television service for customers. As part of his job as an installer technician, Skerski had to engage in overhead and underground work. Performing the overhead work required Skerski to climb ladders, poles, and towers, and work at heights. Skerski began experiencing dizziness, nausea, and irregular heartbeats while working at heights. Skerski was examined by his physician and was diagnosed as having a panic and anxiety disorder associated with premature ventricular contractions of the heart. Skerski was referred to a psychologist for his panic condition. The psychologist recommended that Skerski cease climbing ladders and poles, and otherwise working at heights. Upon learning of the diagnosis, Skerski's supervisor modified Skerski's schedule to permit him to continue working as an installer technician. Thus, Skerski's assignments were limited to underground work. In 1996, Richard Hanning became Skerski's immediate supervisor. Hanning told Skerski that Time Warner could not permit him to continue working on his modified no-climbing schedule. Skerski told Hanning that he could continue to climb "with an accommodation," and asked if he "could have a bucket truck," which he had used before successfully, even after his panic disorder was

diagnosed. Hanning responded that Time Warner didn't have any bucket trucks to give him, but Skerski believed there was an extra bucket truck. Time Warner offered Skerski the opportunity to complete a 90-day training program to allow him to re-acquire the climbing skills necessary to continue in his job as a technician. Skerski attempted, but was unable to complete the training program. Time Warner then offered Skerski an alternative to termination: a newly-created warehouse position that paid considerably less than the technician position. Skerski filed suit and Time Warner's motion for summary judgment was granted. The Third Circuit, however, reversed the summary judgment. The court noted that Time Warner's written job descriptions identified climbing as a job requirement. However, the court stated that "describing climbing as a requirement is not necessarily the same as denominating climbing as an essential function." The job descriptions listed various duties and responsibilities under the heading "Essential Functions," but did not identify climbing as "essential." The failure of both job descriptions to list "climbing" under the heading "Essential Functions," the court stated, suggested one could view climbing as a useful skill or method to perform the essential functions of the job but that it was not itself an essential function of the installer technician position. In addition, Skerski's ability to perform as an installer technician for more than three years without climbing might lead a reasonable juror to infer that Skerski's inability to climb had no adverse consequences for his employer, a factor that is relevant to determining what is an essential function.

The Third Circuit therefore concluded that the district court incorrectly decided that reasonable jurors could only find that climbing was an essential element of the installer technician position. Furthermore, the court held that even if climbing was an essential function, there was a genuine issue of material fact whether Skerski could, with "reasonable accommodation," perform the job as an installer technician. The district court found that Time Warner fulfilled its responsibilities under the ADA by reassigning Skerski to a warehouse position. Skerski contended that Time Warner should have permitted him to use a bucket truck to work at heights as an installer technician, which would have enabled him to avoid climbing. The court found that a genuine issue of material fact existed as to whether providing Skerski with a bucket truck would have been a reasonable accommodation. Time Warner did not argue that bucket trucks were unavailable for Skerski's use, nor did Tim Warner demonstrate that providing Skerski with a bucket truck would have posed an undue hardship.

7. Employee Who Is Unable To Come To Work On A Regular Basis Is Unable To Satisfy Job Functions

Pickens v. Soo Line R.R. Co., No. 00-1497, 2001 U.S. App. LEXIS 19333 (8th Cir. Aug. 30, 2001). The Soo Line employed Dennis Pickens from 1973 until August 16, 1996, primarily as a railroad conductor. On October 14, 1992, Pickens was injured when a train's braking system malfunctioned. He sustained a herniated disc in his lower back. As a result of this injury and after an unsuccessful five-month trial work period, Pickens was unable to continue working for three years. Pickens returned to work in October 1995, but because of medical restrictions limiting his work time to no more than an eight-hour day, he was unable to resume his duties as a conductor. Soo Line offered Pickens a switchman's position to accommodate his medical limitations and Pickens worked as a switchman for three days before concluding the job was too strenuous and refusing to continue working in the position. Pickens continued his cyclical pattern of routinely laying off, obtaining a medical release, and returning to work when he chose. While waiting for clearance to return to work after a layoff in August 1996, Pickens wrote a letter to Soo Line's claims representative with copies sent to Soo Line's president and chief medical officer, expressing his frustration. He wrote in part: "I had my medical restrictions removed to get back to work before and I will do it again if this required. I will totally disregard safety and common sense if this is required." Concerned both with the possibility that Pickens might act on his threat and that Pickens had misrepresented the status of his health, Soo Line held a hearing pursuant to the collective bargaining agreement and subsequently terminated Pickens. Litigation between the parties began when Pickens sued Soo Line alleging claims under FELA stemming from his

October 1992 back injury. In that litigation, Pickens asserted his back injury forever precluded his return to work. After firing, Pickens filed suit alleging that Soo Line had terminated him in violation of the ADA. Following a four-day jury trial, the jury found Soo Line's conduct violated the ADA and awarded Pickens $95,867.15 in past lost wages and benefits and $525,000 in past mental pain and suffering. The district court granted Soo Line's Rule 50(b) motion, finding as a matter of law that Pickens was not a person with a qualified disability and that at the time Soo Line fired him he was neither willing nor able to perform the essential functions of his job, with or without accommodation.

Pickens appealed. He asserted that he was qualified to perform the essential functions of his job regardless of his excessive absences given the nature of the railroad's scheduling structure. Pickens contended that because the railroad allowed employees to "lay off" of working any day of their choosing, that procedure made his use of the practice a nonissue. The Eighth Circuit, however, rejected that argument, noting that "regular and reliable attendance is a necessary element of most jobs." Pickens' choice to lay off twenty-nine times from October 1995 to August 1996 was excessive and eviscerated any regularity in his attendance. The court added that "an employee who is unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones." The court also held that when Pickens applied for disability benefits from the Railroad Retirement Board he asserted under penalty of perjury that he was completely unable to work in the railroad industry because of his disability. Although an admission of a total inability to work is not wholly inconsistent with inclusion under the ADA, this is true only if a reasonable juror could conclude he could perform the essential elements of his job with or without a reasonable accommodation. The Eighth Circuit concluded that no reasonable juror could find Pickens to be a qualified individual because, in light of his own admission, he was unable to perform the essential duties of his job with or without a reasonable accommodation.

8. Nurse With Rheumatoid Arthritis Could Not Perform Essential Job Functions

Stafne v. Unicare Homes, No. 99-3562, 2001 U.S. App. LEXIS 21230 (8th Cir. Oct. 1, 2001). Marion Stafne was terminated after she developed rheumatoid arthritis, a condition that greatly limited her ability to walk and perform the duties of her job as a nurse. Stafne subsequently brought a lawsuit against Trevilla under the Americans with Disabilities Act and the district court granted the employer's motion for summary judgment.

The Eighth Circuit noted that as a nurse at an extended care facility, Stafne had many responsibilities that required significant amounts of walking. For example, with respect to her dining room duties, she had to walk from table to table during breakfast and lunch for three hours every day, serving meals to the facility's residents. Stafne was also in charge of pushing wheelchair-bound residents to their proper seating locations in the dining room and had to perform the Heimlich maneuver if any of the residents should require it. Because these duties were essential functions of Stafne's job, she had the burden to prove that, with reasonable accommodations, she could perform them notwithstanding her disability. The court concluded that Stafne, however, failed to make a submissible case on this issue. All of the evidence at trial showed that Stafne would not have been able to push wheelchairs or assist the residents in their dining even if allowed to use a motorized cart, called an Amigo, which was the accommodation that she requested. The employer's vocational expert testified that it was impossible for Stafne to ride in an Amigo and push wheelchair-bound residents at the same time. In addition, Stafne's own doctors stated that she needed a "totally sedentary sit-down job" and was qualified for "seated work only." The court held that there was no genuine factual dispute that Stafne was unable to perform her duties in the dining room even if she had been allowed the use of an Amigo.

Finally, the Eighth Circuit held that the record did not support a finding that the employer failed to engage in an interactive accommodation process with Stafne. The evidence showed that Stafne

and the employer had numerous discussions concerning her proposed use of an Amigo for work. In particular, the employer met with Stafne and her vocational rehabilitation counselor to investigate whether an Amigo could be used in the facility's dining room area. Thus, there was not sufficient evidence to find that the employer did not act in good faith in attempting to provide Stafne with a reasonable accommodation.

9. Newspaper Employee Who Could Not Operate Machinery and Could Not Perform Essential Job Functions

Mathews v. The Denver Post, No. 99-1329, 2001 U.S. App. LEXIS 19057 (10th Cir. Aug. 24, 2001). John Mathews began work at the Post in 1983 and was promoted to journey-level mailer in 1988. Mathews suffered from epilepsy, including grand mal seizures. The Post received the following letter from Matthews's doctor:

> Mr. John Mathews has epilepsy and has had isolated grand mal seizures, some of which have occurred at work. Unfortunately, there is no cure for this condition though reasonable control has been achieved with Dilantin. However, I cannot assure him that he might not have isolated sporadic seizures without warning. Ideally, it would be best if he were not to drive or work around heavy machinery.

Mathews sought to return to work, but proposed that the Post accommodate him by letting him do the part of the journey-level mailer job that did not involve working with machines. The job description for journey-level mailer listed five essential functions of the job, three of which were: "Stand at insert machines, lifting inserts from pallets and feeding insert machines at the appropriate stations"; "Lift bundles, stack on pallets and push/pull cart or operate power dolly to insert machine or storage areas"; and "Operate power dolly to move dated materials for proper insert run." The Post terminated Mathews because his medical restrictions prevented him from performing the essential functions of his job. Mathews sued the Post, claiming that he was discharged in violation of the ADA, failed to provide a reasonable accommodation for his disability, and fired him in retaliation for filing a complaint with the EEOC.

The Tenth Circuit held that operating the insert machine and power dolly were essential functions of Mathews's job. Mathews admitted that he could not use the insert machine. Mathews argued that he was not prohibited from using the power dolly, even though his doctor had specifically mentioned it as posing a danger. He stated on appeal that his doctor said the power dolly "may pose problems" and by using the word "may" the doctor "invited the Denver Post and Mr. Mathews to use their common sense judgment about the potential consequences if a person using the dolly were to have a seizure." The court rejected this argument, concluding that the Post was not required to disregard the doctor's specific warning that allowing a person subject to grand mal seizures to work with a particular machine may pose problems. The court concluded that because Mathews did not prove that he could perform the essential functions of his job he failed to establish that he was qualified for the job.

C. Selected Court Decisions Concerning "Qualified Individuals With A Disability"

1. Sales Representative With Limited Ability To Talk and Drive Was Not Qualified

Oliva v. Pride Container Corp., 81 F. Supp. 2d 907 (N.D. Ill. 2000). Plaintiff was employed as a sales representative in November 1996. After an automobile accident in September 1997, plaintiff suffered from paralysis in her right eye, pains in her neck, back and head, and temporomandibular joint syndrome (TMJ). Plaintiff was absent for one week following her accident and was subsequently absent for additional doctors' appointments. Plaintiff alleged that her injuries

substantially limited her ability to talk and drive. Her employer, however, claimed that speaking and driving were essential functions of a sales representative. In 1998, plaintiff's sales goals for the first three sales periods were $90,000, $110,000, and $125,000; her actual sales were $56,000, $72,000, and $25,000 respectively. On May 12, 1998, employer terminated plaintiff for low sales volume. Plaintiff sued, alleging violations under Title VII and the ADA. The employer moved for summary judgment.

The court reasoned that if the plaintiff was substantially limited in the tasks of driving and talking, then she could not do her job. However, if she was only minimally limited in these areas, then she was not disabled. The court reasoned that in either scenario, plaintiff was not a qualified individual with a disability unless she could demonstrate a reasonable accommodation which would permit her to perform the essential functions of her position. Because visiting and talking to clients was deemed an integral part of plaintiff's job, the court found reassignment to a different position to be plaintiff's only accommodation alternative. The court found that plaintiff had not met her burden of showing that such an alternative existed; therefore, plaintiff could not demonstrate that she was a qualified individual with a disability. As a result, the district court granted summary judgment in favor of the employer.

2. Employee Unable To Arrive on Time Was Not Qualified

Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000). Earl began working as a Store Area Coordinator in late April 1992. One of her prime responsibilities was preparing for the store's opening in the morning; she was expected to obtain cash for her registers, stock merchandise, and arrange displays. The company's punctuality policy allowed 15 infractions within a 365-day period. In January 1995, after being late 29 times in a 365-day period, she was warned about her tardiness. She informed the company that her Obsessive Compulsive Disorder ("OCD") caused her tardiness. In May 1995, after being late 33 times, she was warned again. In September 1995, after more late arrivals, she was placed on probationary warning. On the same day, the company offered to permit her to arrive up to 15 minutes early. Instead, she asked to be permitted to arrive late and make up the time at the end of her shift. The company rejected this option as unreasonable. After additional late arrivals, she was terminated. Earl sued, alleging violations of the ADA. The district court granted summary judgment in favor of the company and Earl appealed.

The Eleventh Circuit found that punctuality was an essential function of the job because of the nature of her duties. If she was tardy in the morning shift, her area would not be ready for the usual influx of morning customers. If she was tardy in the afternoon shift, the Area Coordinator from the previous shift would be forced to work a longer shift. Additionally, the court found that she failed to identify a reasonable accommodation that would allow her to perform the essential functions of her job. The court noted that her suggestion that the company allow her to arrive late and make up the time at the end of the shift was unreasonable. Moreover, her psychiatrist testified that there was nothing the company could do to assist her in arriving on time. The court held since Earl could not arrive to work on time, she was not qualified under the ADA.

3. Employee Unable To Meet DOT Requirements Was Not Qualified

Bay v. Cassens Transp. Co., 212 F.3d 969 (7th Cir. 2000). Bay was employed in June 1987 by the employer as a long-haul truck driver. In May 1997, he experienced chest pains and was subsequently underwent surgery for a pacemaker that corrected his heart condition. In June 1997, the employer instructed him to report to Healthline, an organization that performed Department of Transportation ("DOT") physicals for return-to-work re-certification. Healthline informed the employer that Bay was permanently disqualified from driving under DOT regulations. He disputed this determination. Pursuant to the terms of the collective bargaining agreement, he was examined by an

impartial physician, who also refused to certify him. He then took his claim to arbitration and a third examination was ordered. He passed this examination, was re-certified, and returned to work. Bay sued, alleging that the employer violated the ADA for refusing to reinstate him before he was ultimately re-certified. The district court granted the employer's motion for summary judgment, and Bay appealed.

Bay argued that he was denied reinstatement because the employer "regarded" him as disabled. The Seventh Circuit held that an employer has a defense to a charge of discrimination if an action is "required or necessitated by another Federal law or regulation." The court noted that under applicable DOT regulations, the employer was not allowed to permit Bay to resume driving until he produced a copy of a doctor's certificate indicating he was physically qualified to drive, and nothing in the ADA purported to alter that obligation. The court found that it was not until a physician determined that Bay was qualified to drive pursuant to DOT standards, that he was "otherwise qualified" under the ADA. The court therefore held that because he was not qualified at the time he requested reinstatement, the district court's grant of summary judgment in favor of the employer was proper.

4. General Lifting Restriction, Without More, Are Insufficient To Constitute a Disability

Brunko v. Mercy Hosp., 260 F. 3d 939 (8th Cir. 2001). Kimberly Brunko began working at Mercy Hospital in 1987 as a staff nurse. She was later transferred to the trauma center. Brunko injured her back in a work-related accident and underwent a diskectomy Brunko provided Mercy with a return-to-work slip issued by her physician with a permanent lifting restriction of no more than 40 pounds. At that time, Mercy had in place a 75-pound lifting requirement for staff nurses. Brunko left Mercy Hospital and filed suit. Mercy asserted that it encouraged Brunko to apply for and offered her other available positions in the hospital, but she accepted employment at another health services company instead. The district court concluded that Brunko was not disabled or perceived to be disabled within the meaning of the ADA.

On appeal, Brunko contended that she was substantially limited in the major life activity of working as a result of her 40-pound lifting restriction. The Eighth Circuit disagree. The court noted that lifting itself is identified as a major life activity; however, a general lifting restriction without more is insufficient to constitute a disability within the meaning of the ADA. Additionally, Brunko was only precluded from performing a narrow range of jobs as evidenced by the fact that she had worked in several nursing jobs after leaving Mercy and the fact that Mercy offered her other positions in the hospital that did not require lifting more than her limit. Hence, she was not disabled from the life activity of working because of her lifting restriction.

The court also rejected Brunko's contention that Mercy perceived her as disabled. To be regarded as disabled under the ADA, the court noted, Brunko would have to show that Mercy mistakenly believed that she had a physical impairment that substantially limited one or more major life activities, or that Mercy mistakenly believed that she had an actual, nonlimiting impairment which substantially limited one or more major life activities. Brunko supported her argument with the deposition testimony of John Engelby, the head of Mercy's human resources department. Engelby testified that Brunko would be incapable of performing any staff nursing work at the hospital, as evidence of her perceived disability. The Eighth circuit held, though, that Engelby's perception was not based on any myths or archaic attitudes about the disabled; rather, his perception was based on Brunko's own treating physician's recommendation that she could not work in certain positions which would require her to lift more than 40 pounds. In addition, Mercy did not perceive Brunko's lifting restriction as substantially limiting the major life activity of working because Mercy encouraged Brunko to apply for other positions in the hospital.

X. DIRECT THREAT TO HEALTH OR SAFETY

A. Introduction

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself or herself or others in the work place.[61] An individual who poses a direct threat, after reasonable accommodation, is not qualified for the position.[62]

A "direct threat" is defined in EEOC regulations implementing the ADA as a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.[63] The determination of whether an individual poses a "direct threat" must be based on an individualized assessment of the person's current condition.[64] The assessment must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, rather than fear or speculation.[65]

An employer has the burden of showing that an individual poses a direct threat. In determining whether an individual would pose a direct threat, the factors to be considered include: (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm will occur; and (d) the imminence of the potential harm.[66] The EEOC provides the following examples of additional factors which may be considered in determining a "direct threat":

1. Input from the individual with the disability;

2. The experience of this individual in previous jobs (*e.g.*, the work history of the applicant); and

3. Documentation from medical doctors, psychologists, rehabilitation counselors, physical or occupational therapists or others who have expertise in the disability involved and/or direct knowledge of the individual with the disability.[67]

An employer should have substantial documentation regarding its assessment of both the individual's condition and the particular position at issue. If an employer determines that an individual poses a direct threat as a result of a disability, the employer must then determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level.[68]

An employer can only consider significant risks (*i.e.*, those with a high probability of substantial harm).[69] Therefore, a speculative or remote risk is insufficient to disqualify an individual from a position under the ADA.[70] Employers may not take action based on fear or prejudice. Employment decisions must be based on the objective facts of each situation rather than on generalizations.[71] The standards established by the employer must be applied to all applicants or employees and not only to individuals with disabilities.[72]

Taking adverse action against an individual because he or she poses a direct threat to the health and safety of others in the work place would not violate the ADA, provided that the threat is significant rather than speculative or remote, and provided the threat cannot be eliminated or reduced through reasonable accommodation.[73] The ADA does not impose on applicants or employees the responsibility to prove that they pose no risk to others.[74]

A decision may *not* be made to disqualify an individual with a disability who is currently able to perform the essential functions of the job because of: (1) speculation that the disability may cause a

risk of future injury; (2) the potential increased cost of workers' compensation; or (3) the potential increased costs of health insurance.

B. Selected Court Decisions Regarding Direct Threat

1. Ninth Circuit Rules "Direct Threat" Defense Applies Only To the Health and Safety of *Others*

Echazabal v. Chevron USA, Inc., 213 F.3d 1098 (9th Cir. 2000). Echazabal began working in 1972 for a contractor at the employer's oil refinery. In 1992, he applied for employment directly with Chevron. His preemployment physical revealed his liver was functioning abnormally. Chevron rescinded the employment offer because it feared that the solvents and chemicals present in the plant would further damage his liver. He continued working with the contractor at the plant. He was subsequently diagnosed with chronic active hepatitis C; however, none of his physicians advised him to stop working at the plant. In 1995, he again applied for a job with Chevron and was turned down after a preemployment physical. However, this time Chevron requested that the contractor immediately remove him from exposure to chemicals. As a result, Echazabal lost his refinery position. He sued, alleging ADA violations. The district court granted summary judgment in favor of the employer based on the EEOC's interpretation of the "direct threat" defense. Echazabal appealed.

Chevron argued that it was proper to deny his employment because it could reasonably conclude that he would pose a direct threat to his own health if he worked at the refinery. The Ninth Circuit noted that while the ADA states that "an individual shall not pose a direct threat to the health or safety of *other individuals*," the exception does not include a direct threat to the individual *himself*. The court also found that the ADA's legislative history warned that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." The court therefore reversed the district court's grant of summary judgment in favor of the company.

2. Doctor Under the Influence of Alcohol During Patient Appointments Posed Direct Threat To Those Patients

Bekker v. Humana Health Plan, 229 F.3d 662 (7th Cir. 2000). Dr. Stephanie Bekker began practicing as an internist at Humana's Lincoln Park Center in 1983. During her employment, Bekker worked weekdays and every other Saturday. In addition, she was on call three to five times each month. In 1990, a nurse at Humana informed the Clinical Director that a rumor was circulating that Bekker smelled of alcohol while working. When alcohol tests returned negative, Bekker resumed her duties. In 1996, a patient complained that Bekker smelled of alcohol during her appointment. During the course of an investigation, the hospital learned that a medical assistant smelled alcohol at least once a week. In addition, a nurse reported that she had smelled alcohol on Bekker two or three times per week over the previous two years. When Bekker refused to adhere to conditions of continued employment which included, among other things, entry into a treatment program, the hospital terminated her and revoked her credentials.

The district court granted summary judgment in favor of Humana. On appeal, the Seventh Circuit found that the health plan presented sufficient evidence to show that the physician had treated patients while under the influence of alcohol. Under such circumstances, the court held, Bekker posed a direct threat to the health and safety of her patients. Consequently, she was not otherwise qualified to perform the essential functions of her position as an internist. In addition, though Bekker proposed to submit to daily alcohol testing, the hospital had no obligation to accept its employee's proposed accommodation. Rather, the facility met its duty to offer a reasonable accommodation by permitting Bekker to retain her position if she entered a treatment facility.

3. Dizzy Forklift Driver Presents a Direct Threat

Hernandez v. Wilsonart Int'l, Inc., No 99-1882-CIV, 2000 U.S. Dist. Lexis 19270 (S.D. Fla. Nov. 22, 2000). Ricardo Hernandez was employed by Wilsonart as a warehouseman until his termination in November 1998. Hernandez's duties included driving forklifts, cutting down oversized laminates to fill orders, turning tables, loading tables into metro trucks, and moving furniture. Having been diagnosed with diabetes as a child, Hernandez performed these various duties without complication following his 1993 hiring. In August 1998, however, two separate doctors confirmed that Hernandez was often dizzy and nauseous from his diabetes, that he could neither stand nor lift, and that he could no longer drive a forklift. By the time Wilsonart terminated Hernandez, he had exhausted all of his paid time off and his leave time permitted under the FMLA.

The central issue in Hernandez's discrimination claim was whether he was qualified to perform the essential functions of his position as a warehouseman. After noting that Hernandez's afflictions prevented him from safely performing almost all of his duties, the court found him not to be a qualified individual with a disability and entered summary judgment in favor of Wilsonart.

4. Blasting Technician With Blurred Vision Presents an Explosive Direct Threat

Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284 (10th Cir. 2000). Dennis Borgialli brought suit against his former employer, the Black Thunder Mine in Gillette, Wyoming, alleging that the mining company terminated his employment in violation of the ADA. During the course of his 18 year employment with the mining company, Borgialli worked as a blaster and was required to perform such tasks as drilling holes up to 240 feet in depth, operating vehicles for the transportation of explosives, and the placement and detonation of large amounts of explosives. As part of his job, Borgialli was required to work closely with high explosives, to operate heavy machinery in dangerous geographical conditions, and maneuver in close proximity to high walls and sheer drop-offs.

Beginning in early 1996, Borgialli encountered a variety of health problems, ranging from blurred vision and dizziness to nausea. Ultimately, doctors diagnosed Borgialli with migraine headaches. This diagnosis was followed by a restricted medical release mandating that Borgialli not be permitted to drive heavy equipment. After Borgialli demonstrated suicidal tendencies, the mining company requested that he submit to various psychiatric evaluations to determine whether he was a threat to himself or others. When he refused to submit to a third requested evaluation, Thunder Basin terminated him.

Following the district court's grant of summary judgment in favor of his former employer, Borgialli appealed. The court of appeals, in rejecting his appeal, focused on the potential threat posed by Borgialli towards his co-workers. As the court noted, under the ADA it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety to himself or others. The ADA does not, in other words, require employers to take unnecessary risks when dealing with a mentally or physically impaired employee in an inherently dangerous job. Where an employee like Borgialli, who harbored a grudge against a supervisor, threatens suicide and injury to his co-workers, that employee poses a direct threat to himself and others. Such an employee is not a qualified individual within the meaning of the ADA. Therefore, because he posed a direct threat to himself and others, the court of appeals held that the district court was correct in granting summary judgment in favor of his former employer.

XI. REASONABLE ACCOMMODATION

Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination in employment. However, neither the statute nor the courts have developed a "bright-line" test or process for reasonable accommodation. Indeed, the ADA does not even define the term "reasonable accommodation." Rather, it offers examples of common types of accommodations which an employer may be required to provide, including job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials, or policies, and the provision of qualified readers or interpreters.[75] This list is not intended to be exhaustive, and other forms of reasonable accommodation may be required, based on the specific circumstances involved.[76]

The EEOC Manual circuitously defines reasonable accommodation as any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy equal opportunities in employment.[77] EEOC Guidance explains why the Act does not more specifically dictate forms of reasonable accommodation:

"The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations that would overcome those limitations."[78]

"The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."[79]

The employer's liability may extend to damages incurred between the time a reasonable accommodation should have been offered, and the time it was finally offered. At least one court has found that the offer of a reasonable accommodation does not retroactively extinguish a claim for damages incurred during the period before the accommodation was offered. *See* ***Pugliese v. Arizona***, No. 98-16448, 1999 WL 1044331 (9th Cir. Ariz. Nov. 5, 1999).

A. Accommodation of Known Disabilities

Generally, an employer is obligated to make an accommodation only to the "known" impairments of an otherwise qualified individual with a disability. It is the responsibility of the applicant or employee with a disability to inform the employer that an accommodation is needed to participate in the application process, to perform essential job functions, or to receive equal benefits and privileges of employment.[80] There is no obligation to provide accommodation until a request is made to the employer.[81] Indeed, it is a violation of the ADA to provide accommodation where there has been no request.[82]

However, some courts have suggested that if the employer knows about *both* the disability *and* the need for accommodation, it may have an obligation to provide the accommodation--even without the employee's express request. *See, e.g.*, ***Schmidt v. Safeway, Inc.***, 864 F. Supp. 991 (D. Or. 1994) (employer had reasonable accommodation obligation because it knew of employee's alcohol problem, it had reason to believe employee could do his job if accommodation was made, and an accommodation request would have been futile due to employer's policy of immediate termination for positive urine test); ***Bultemeyer v. Fort Wayne Community Sch.***, 100 F.3d 1281 (7th Cir. 1996).

Employers are responsible for notifying job applicants and employees of the employer's obligation to provide accommodation. This notification must be posted in a conspicuous place.[83] It may

also be communicated orally or through job application forms, job vacancy notices, or personnel manuals.[84]

B. Defenses

An accommodation will not be required if it imposes an "undue hardship" on the employer. An undue hardship is an action that requires "significant difficulty or expense" in relation to the size of the employer, the resources available, and the nature of the operation.[85] Whether a particular accommodation will impose an undue hardship must be determined on a case-by-case basis.[86] An accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.[87]

C. Interactive Process

1. Employee Must Ask For a Reasonable Accommodation

Davis v. Guardian Life Ins. Co. of Am., 11 A.D. Cas. (BNA) 550 (E.D. Pa. Dec. 14, 2000). From 1988 until 1997, Guardian employed Denise Davis as an insurance underwriter. Only one year into her employment with Guardian, Davis contracted Crohn's disease, an auto-immune disease that causes a chronic inflammation of the bowels resulting in cramps and explosive diarrhea. As a result, Davis was absent from work for as much as 225 days out of the year. Notwithstanding her absences, however, Davis continued to receive high ratings and Guardian accommodated her absences. When Guardian attempted to confirm Davis's work schedule in a letter dated April 22, 1997, Davis refused, citing the possibility that she may need additional sick leave. In light of Guardian's insistence that she work by the proposed schedule and its refusal to provide further sick benefits, Davis filed suit, alleging that Guardian failed reasonably to accommodate her disability and thereby discriminated against her.

Following a trial on the merits, the jury found for Davis and awarded her $1,500,000.00 in damages. Guardian immediately filed a motion for judgment notwithstanding the verdict. Finding no evidence to permit the reasonable trier of fact to find for Davis, the court granted Guardian's motion and decreed that Davis take nothing on her claim. The court focused on the interactive process that must occur between the employer and the employee to reach a reasonable accommodation. According to the court, participation in this process is an obligation of both parties and neither can be faulted if the other does not supply information or answer requests of the other.

The present case, according to the court, offered an example in which the parties did not adequately engage in an interactive process to find a reasonable accommodation. Despite the unpredictable nature of Davis' affliction, she was still willing and able to appear at work at least two days a week. By rejecting out of hand her employer's proposal to name her two days in the office on the Friday prior to each work week, the court found that she was not engaging in the type of interaction contemplated by the ADA. This constituted a failure to comply with her duty to cooperate in the interactive process. Accordingly, the court found that any judgment for the employee could not be supported by the facts and circumstances of the case.

Todd v. McCahan, 11 A.D. Cas. (BNA) 1257 (N.D. Ga. Oct. 31, 2000): Plaintiff Stephen Todd was hired by Airborne Express as a customer service representative in March 1998, working under the supervision of John McCahan. During an initial two-week training course, Todd was made aware that an "essential function" of his position would be answering the telephone and assisting customers by tracking packages and scheduling pickups. From the beginning of his employment, Todd suffered from performance problems: he took breaks without authorization; scored 28 out of a possible 100 in handling customer calls during a routine coaching and development session; failed to be available at his phone for

six minutes during the peak customer call-in hour, when no one is authorized to take a break; failed to follow the chain of command in reporting a problem; and during a training session he was ordered to attend with a group of new hires, interrupted the class, said that he was "bored" and exited the session early. A few days after the "bored" comment, Todd sent an e-mail to McCahan and other Airborne officials, stating that he had Attention Deficit Hyperactivity Disorder ("ADHD"), and followed the e-mail up with a letter to McCahan and Airborne's vice president of human resources. However, neither the e-mail nor the letter requested any accommodation. Todd's performance problems and insubordination continued unabated. On June 16, a senior customer service representative monitoring Todd's calls noted that in several instances, he answered the telephone, failed to greet the customer and failed to respond when the customer asked if anyone was on the line. She reported this to McCahan, who confronted Todd. When Todd became upset and disruptive, McCahan told him to gather his things and to leave the premises. Todd sued under the ADA, alleging discrimination, harassment and retaliation due to his disability.

In support of his failure to accommodate claim, Todd provided evidence that his May 1998 letter informing McCahan and the HR vice president of his ADHD stated that he was "'requesting additional assistance from Airborne Express in order to better cope and deal' with his impairment." However, the court rejected this claim because even though the evidence showed that defendants responded to the letter and "offered to engage in a good faith dialogue regarding specific accommodations," Todd admitted that he never suggested a specific accommodation to anyone at Airborne. He even claimed that ADHD did not detrimentally affect his job performance, stating that it helped him because he could "tend to hustle a little bit more than other people." Todd's retaliation claim was likewise dismissed because Todd failed to identify any statutorily protected activity in which he was engaged. The court noted that even if Todd had engaged in protected activity, the claim would still be dismissed because defendants identified a legitimate nondiscriminatory reason for his termination.

2. Employee Must Propose a Specific Position as Part of the Interactive Process

Treanor v. MCI Telecomm. Corp., 200 F.3d 570 (8th Cir. 2000). Christine Treanor began her employment at MCI as a special clerk in 1978 and subsequently rose to the level of Senior Technical Consulting Services Manager. In January 1991, Treanor requested and received a medical leave of absence in connection with depression, chronic fatigue, and concentration difficulties. In August 1991, she requested to return to her former position on a part-time basis and asked that the job be restructured to cover only territory in Minnesota. Because of the length of her leave, however, Treanor was not eligible for an automatic return to her former position under applicable MCI policy. Consequently, Treanor was forced to return in a lesser position. Following a second leave of absence, MCI informed Treanor that she would be terminated unless she could find work within the company within two weeks. No part-time positions were available at the time according to MCI and Treanor did not apply for any specific job. Accordingly, MCI terminated her employment.

Following the district court's grant of summary judgment in favor of MCI, Treanor appealed. The court of appeals affirmed the grant of summary judgment. In reaching its decision, the court found that MCI did not fail to engage in the interactive process between employer and employee in an attempt to craft a reasonable accommodation. Without any evidence to suggest that MCI acted in bad faith in not looking further for another position and without evidence that Treanor herself sought a specific position, the court found that MCI acted reasonably in seeking an accommodation.

3. Employer Under No Duty To Engage in the Interactive Process Until Employee Obtains a Medical Release

Ferguson v. Wal-Mart Stores, Inc., 114 F. Supp. 2d 1057 (E.D. Wash. 2000). In September 1994, Wal-Mart Stores hired Michaela Ferguson as a counter manager in the pharmacy department of the company's Wenatchee, Washington, store. In the fall of 1997, Ferguson began to suffer severe problems with her knee as a result of a condition diagnosed as degenerative or hypertrophic arthritis. As a result, she could not perform the essential functions of her position by the middle of September 1997. Ferguson therefore requested and received a medical leave of absence and during that time underwent total knee replacement surgery. Pursuant to a neutral absence control policy, Wal-Mart notified Ferguson that if she did not return to work by December 16, 1997, three months from the commencement of her medical leave of absence, she would be terminated. Ferguson's physician, however, refused to release his patient to return to work without restrictions until January 8, 1998. Without any positions available to which Ferguson could return, however, Wal-Mart terminated her employment in February.

In rejecting the employee's claims of disability discrimination, the court held that when an employee seeks to return to work following a medical leave of absence, her employer's duty to reasonably accommodate her is triggered at the time the employee provides her employer with a release from her health care professional which essentially states that the employee has the ability to perform the essential functions of her job with reasonable accommodation. The release may be as simple as a return to work slip containing some restrictions signed by a medical health care professional. This would trigger the duty to engage in the reasonable accommodation dialogue without compelling a result or an agreement. Because Ferguson did not provide Wal-Mart with any type of release from her doctor until January 1998, it did not until that time have an obligation to engage in the interactive process to craft a reasonable accommodation.

4. Employer Under No Obligation To Adopt Employee's Proposed Accommodation

Jay v. Intermet Wagner Inc., 233 F.3d 1014 (7th Cir. 2000). As a millwright for Intermet Wagner, Jack Jay installed new equipment and maintained and repaired existing machines. Because much of the equipment was located high in the plant, millwrights were required to climb stairs or ladders to reach their assignments. In 1992, Jay tore the Achilles tendon in his left ankle. As a result he took sick leave and underwent surgery. When he returned to work after six months, Jay received a position as an inspector: a job that required climbing. Jay reinjured his ankle in May 1993 and again requested and received sick leave to pursue therapy. Upon his return, Jay returned to the inspector position. The inspector position, however, consistent with the applicable collective bargaining agreement, expired in October 1994. Consequently, Wagner placed Jay on medical leave. Refusing to return Jay to the position of millwright, the company ultimately recalled Jay and placed him first as a box builder and later as a tractor operator. Because he was unable to return to his position as a millwright, Jay filed suit, alleging disability discrimination.

The district court entered summary judgment in favor of the company. Affirming this judgment, the court of appeals noted that it is the employer's prerogative to choose a reasonable accommodation; an employer is not required to provide the particular accommodation that an employee requests. Consequently, Wagner was not required to return Jay to the position as a millwright and could place him in another vacant position. This placement, however, required a 20-month delay during which time Jay could not work. While unreasonable delay in providing an accommodation can provide evidence of discrimination, evidence that Wagner considered Jay for reassignment to an open position on a weekly basis defeated any inference that the company had acted in bad faith. Consequently, the employee presented no evidence to support his claim of discrimination.

5. Employer Must Engage in Individualized Assessment of Whether Employee Can Perform Essential Job Functions

Cripe v. City of San Jose, 261 F. 3d 877 (9th Cir. 2001). The plaintiffs, San Jose police officers with neck and back injuries that prevent them from serving as patrol officers, contended that the City of San Jose's policy that categorically restricted the jobs that officers with disabilities could perform violated the Americans with Disabilities Act. The City contended that public safety would be compromised if officers with physical limitations that prevent them from forcibly arresting suspects were permitted to perform more than the prescribed handful of jobs on its police force. The Ninth Circuit, though, agree with the plaintiffs that the City's policy relegating them to unsatisfactory jobs in which they had little or no possibility for promotion could not be reconciled with the ADA's "clear and comprehensive national mandate" to "eliminate . . .discrimination against individuals with disabilities." The City of San Jose had developed a plan for reassigning patrol officers who became disabled. The policy, called the "Modified Duty Policy," was the result of a negotiated agreement between the City and the police union. Under that policy, officers "not fit for regular assignment" were assigned to a "Modified Duty Pool." The Ninth Circuit noted, that the Modified Duty Policy did not permit the City to make any individual assessment as to whether an officer, with or without an accommodation, could perform the essential functions of any job other than the "modified-duty" positions. Thus, a question of fact was raised as to whether this lack of individual assessment was a form of disability discrimination.

D. Working at Home May Be Required As a Reasonable Accommodation

1. Eighth Circuit Holds That Employee's Work-at-Home Request Was Not Reasonable Accommodation Where Computer Software Essential To Job Duties Could Not Be Accessed from Employee's Home

Heaser v. Toro Co., 11 A.D. Cas. (BNA) 1320 (8th Cir. Apr. 26, 2001): Plaintiff Lynn Heaser worked as a marketing services coordinator for The Toro Company, and her duties included taking orders for materials by phone and in person, and processing the information on carbonless paper forms and by computer. In 1991, Heaser developed health problems which increased in severity during her employment with Toro, eventually resulting in various diagnoses, including petrochemical sensitivity, fibromyalgia, allergies, and multiple chemical sensitivities. In May of 1996, when Heaser informed her supervisor that she was having difficulties working entire days because of her illness, although Toro did not have a work-at-home policy, it permitted her to leave the facility when she became too ill to work for a three-month period. Although no performance deficiencies were noted during the three-month period, Heaser admitted that she was not fully performing her job. She was moved to a different office, which failed to alleviate her symptoms, and she eventually took a medical leave of absence. In December 1996, when Heaser's short-term disability benefits were about to expire, she requested that she be allowed to work at home. Toro denied the request in January 1997, but offered to move her to another location within the facility. When negotiations for a reasonable accommodation failed, Toro requested that Heaser provide it with a letter from her doctor stating that she was fit to work. Toro terminated Heaser in March 1997, when one of her treating physicians provided a letter stating that she would be fit to work if she was able to avoid plastics, carbonless paper, copiers and their fumes, exhaust fumes, and other personnel wearing perfumes, etc. Heaser filed suit, alleging, among other claims, a failure to accommodate. The district court granted Toro's motion for summary judgment and Heaser appealed.

In affirming summary judgment, the court first addressed Heaser's claim that given the status of current technology, allowing her to work from home would have been a reasonable accommodation. The court, however, noting Toro's evidence that a the necessary computer software used by Heaser to perform her work at Toro could not be accessed from Heaser's home, agreed with Toro that it was not required to "make an overall change in its manner of conducting business to accommodate

Heaser." For the same reason, Heaser's suggestion that Toro could have further computerized its system so she would not have to work with carbonless paper was rejected by the court.

2. Employer Need Not Permit Claims Adjudicator With Spina Bifida To Work At Home

Kvorjak v. State of Maine, 259 F.3d 48 (1st Cir. 2001). Brian Kvorjak claimed that his former employer, the Maine Department of Labor, wrongfully failed to accommodate his disability when it refused to allow him to work at home after his office closed and his position was relocated to a distant facility. Kvorjak was partially paralyzed as a result of spina bifida. The condition limited his ability to walk, caused problems with his bowels and bladder, and at times triggered pain when he sat, stood or laid down. Despite these difficulties, Kvorjak successfully worked for various state agencies in Main for twenty-two years, the last seven and one-half as a claims adjudicator for the Department of Labor's Division of Unemployment Field Services. In the mid-1990s, the Division decided to cut expenses by closing fifteen field office, including the office where Kvorjak worked, and shifting services to three call centers in other parts of the state. One of the call centers was in Bangor. Kvorjak made the commute from his home to Bangor on two consecutive days but the lengthy drive resulted in substantial pain. Kvorjak requested the accommodation of working at home on a full-time, permanent basis. The Division rejected Kvorjak's request. The State, however, did offer to pay relocation costs if he moved closer to a call center, a benefit provided to all re-assigned employees, and also offered to pay for temporary housing. Kvorjak declined to move, and he was laid off. Kvorjak filed suit and the district court granted summary judgment for the defendants concluding that he had failed to offer evidence sufficient to demonstrate that he could accomplish "essential" aspects of his job at home.

The First Circuit noted that claims adjudicators were "the most senior, non-supervisory technical resource" at the call centers, and one function resulting from that experienced status was to serve as "Adjudicator of the Day" approximately once a week. Adjudicators of the Day were the primary people responsible for trouble-shooting and problem resolution for that day. Their names were posted in visible locations within the call centers so that claims staff know who to go to with questions and problems. They were to remain accessible so that they could help other employees at the other employees' workstations if needed. Kvorjak offered no evidence suggesting that, despite the written task statement and departmental expectations, the advisory function of the claims adjudicator position comprised only an insignificant portion of a claims adjudicator's job. The court concluded that the essential functions of a claims adjudicator could not be performed at an individual employee's home. Therefore summary judgment was affirmed.

E. Selected Decisions Concerning Reasonable Accommodation

1. Eighth Circuit Affirms Jury Award for Supervisor Who Was Terminated for Accommodating an Employee's Disability

Foster v. Time Warner Entertainment Co., No. 00-2734 (May 24, 2001): In ***Foster***, the Eighth Circuit affirmed a jury verdict of almost a quarter of a million dollars against Time Warner for firing a supervisor who accommodated an employee under her supervision. Over half of the verdict consisted of punitive damages.

Jane Foster was a supervisor of customer service representatives at Time Warner's facility in Fayetteville, Arkansas. One of the employees she supervised, Kevin Terry, informed her that he suffered nocturnal epileptic seizures that made it difficult for him to consistently arrive at work on time in the morning. Because he had more seizures on the weekends, he also informed Foster that he might often miss some work on Mondays. Pursuant to the Time Warner Human Resources Manual, which included epilepsy in its definition of disability and mentioned a flexible schedule as an example of a reasonable

accommodation, Foster allowed Terry arrive at work after the regular starting time and stay later in the evening to make up the missed time. When a change in medication resulted in more frequent seizures, Foster again permitted him to adjust his schedule and he arrived at work late more often following the adjustment.

The accommodation made for Terry angered his coworkers and their complaints found their way to Cindy Snyder, who supervised the Fayetteville office from her home base in Memphis, Tennessee. When Snyder brought the complaints to Foster's attention, Foster told Snyder that Terry was covered by the ADA and that he should receive the accommodation mentioned in the company manual. However, in order to quash the complaints, Snyder issued a new sick leave policy prohibiting employees from making up time missed because of illness. When Foster repeatedly questioned Snyder about the effect of the new policy on Terry's accommodation, Snyder told her that she had consulted Human Resources and that he "needs to come to work" and "needs to take sick time." Snyder also told Foster to "let [her] worry about the ADA," that it was "none of [Foster's] business," that "we don't have to follow the ADA," and "I don't care about the policy [in the manual.]" Snyder even memorialized her attitude in two memos, which contained statements to the effect that Terry should not be treated "any different than any other employee" and that he would not be permitted to make up the time he missed but would have to take sick time off.

After the new sick leave policy was issued, Foster continued to allow Terry to work a flexible schedule. Unknown to Foster, however, Snyder asked Melanie Wilkerson, the Fayetteville office's technical supervisor, to monitor Terry's work hours. Snyder made this request even though she was aware that Wilkerson was upset with Terry for filing a grievance against one of the employees she supervised. Wilkerson reported to Snyder that Terry was absent from work on five occasions when he claimed on his time sheets that he worked full days, that he was absent about once a week, that others had to do his job, and that he claimed to have worked overtime on various occasions. However, because the time sheets recorded the number of hours worked, but not the times, it was possible that Terry worked after Wilkerson left for the day. Indeed, one coworker testified that many times when she called late at night, Terry was still there working. Without investigating or verifying Wilkerson's reports, Snyder and her supervisor, Bruce Simmons, discharged Terry for falsifying his time sheets. Snyder and Simmons also met with Foster and told her that they were going to terminate her for colluding with Terry in falsifying his time sheets. During the meeting, Foster showed Snyder and Simmons the parts of the company disability policy listing epilepsy as a protected condition and indicating that a flexible schedule was an appropriate accommodation. However, Snyder and Simmons responded that they did not have to provide Terry with an accommodation.

Following her termination, Foster sued under the ADA, alleging that she was fired in retaliation for opposing the withdrawal of Terry's accommodation and for opposing his termination. Foster's evidence—that Terry had not falsified his time sheets, that his work had all been done, that other employees saw him working late at night, that Snyder refused to accommodate Terry and had enlisted an employee who was antagonistic towards Terry to spy on him, and that Time Warner never verified Wilkerson's reports before firing Terry—was overwhelming. Pointing to the fact that Foster repeatedly questioned Snyder about how the new policy affected Terry's accommodation, met with Snyder to discuss the matter, and then continued to allow Terry to work a flexible schedule, the court held that Foster had "refused to implement the sick leave policy," and had thus engaged in protected activity for which she was terminated. For this reason, the court declined to overturn the jury's verdict.

2. Eighth Circuit Holds That Employer Is Not Required To Place Disabled Employee on Indefinite Leave Until a Suitable Position Becomes Available

Boykin v. ATC/VanCom of Colorado, 11 A.D. Cas. (BNA) 1204 (10th Cir. Apr. 17, 2001): Fred Boykin, who worked for VanCom as a part time bus driver while he was attending college, had a history of suffering transient ischemic attacks (TIA's or mini-strokes). In 1998, he suffered a TIA while he was driving a VanCom bus. Although his personal physician released him to return to work, VanCom required that he be examined by one of its physicians. The VanCom physician revoked Boykin's medical certification for commercial driving for a period of a year, on the condition that if Boykin did not suffer any additional TIA's during the one-year period and was medically cleared by a neurologist, his certification would be reinstated. Boykin, who was disqualified only from driving commercial vehicles, requested that VanCom accommodate him by providing him with a dispatch operator or data entry clerk job. However, the only position VanCom had open at the time was that of bus cleaner, a job which Boykin declined because of conflicts with his school schedule. He was then terminated.

Six months later, when new positions became available at VanCom due to a new contract, Boykin was notified that a dispatch operator position was open. Boykin was required to apply and interview for the job, but he was not hired. He sued under the ADA, alleging that VanCom was required to give him the new dispatcher position without requiring that he compete with other applicants. Boykin also alleged that the offer of the bus cleaner position violated the ADA because VanCom was aware that the schedule conflicted with his school schedule. The district court granted summary judgment on Boykin's claims, holding that VanCom fulfilled its reasonable accommodation obligations when it offered Boykin the bus cleaner position, and that VanCom was under no obligation to offer Boykin a position six months after his termination. Boykin appealed to the Eighth Circuit, which affirmed the summary judgment.

The Eighth Circuit first noted that VanCom and Boykin both agreed that VanCom was unable to provide Boykin with his requested accommodation at the time of his termination. Nonetheless, Boykin argued that VanCom should have placed him on indefinite leave because at the time, it was attempting to secure the contract which resulted in the new job positions. Although the court noted that the determination of how long an employer should retain a disabled employee until a suitable position opens up should be made on a case-by-case basis, it disagreed with Boykin's assertions, stating that it was not persuaded that reasonable accommodation requires an employer to "place an employee on indefinite leave until a position for which he is qualified opens up." The court pointed out that although VanCom was in negotiations for a new contract at the time Boykin was terminated, the contract negotiations did not automatically mean that a new contract would be signed or that the contract would enable VanCom to add new positions.

3. First Circuit Affirms Summary Judgment for Employer Where Plaintiff Failed To Notify Employer of Her Disability and Failed To Request Reasonable Accommodation

Reed v. LePage Bakeries, Inc., 11 A.D. Cas. (BNA) 1150 (1st Cir. Apr. 5, 2001): Plaintiff Manuella Dionisio Reed began working for LePage, a large commercial baking company, as an assembly line worker in 1987. During her employment, she was diagnosed with bipolar disorder, which caused her to fare badly in stressful situations and to be prone to losing her temper and becoming verbally abusive when involved in confrontations. In 1995, Reed flew into a profanity-infused rage when a machine broke down during her shift and a mechanic was unable to fix it. The incident resulted in her becoming depressed, with thoughts of suicide, and she was hospitalized for a week. Upon her release, her therapist advised her to request an accommodation of her disability by allowing her to walk away from

stressful situations in order to avoid losing control. After she returned to work, she met with the plant manager, Mike Pelletier, to discuss her poor attendance record. Although Reed did not inform Pelletier of her disability and did not request an accommodation, Pelletier brought up her altercation with the mechanic and told her that in the future she should walk away from such situations before they become aggravated and get a supervisor to settle the matter. She agreed, told him that she had planned to suggest the same thing herself, and mentioned that she could get a note from her therapist if necessary. Pelletier indicated that it would not be necessary.

In June 1996, during a meeting with her floor supervisor, Jerry Norton, and human resources director Cindi Callahan, to determine the extent of the duties Reed would be able to assume following a workers' compensation leave, Reed again became abusive and shouted profanities at the managers when they refused to discuss other matters of concern to Reed. When she told them "____ you" and tried to leave the meeting, Callahan told her she could not return to work unless the meeting was concluded and her restrictions were discussed. Reed continued issuing a string of profanities and eventually left the meeting and sought out the head of personnel in an attempt to justify her conduct. She explained that she had a mental illness that caused her to lose control of herself, and that she tried to exercise an accommodation by leaving the meeting but she was prevented by Callahan from doing so. Despite this explanation, Reed was terminated for insubordination and threatening conduct.

She sued under the ADA and the district court granted LePage's motion for summary judgment. Reed appealed to the First Circuit. The court first held that in order to prove reasonable accommodation, the plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that it is feasible for the employer under the circumstances. However, in this case the court stated that it need not concern itself with the reasonableness of Reed's suggested accommodation, because Reed failed to prove that she ever sufficiently requested the accommodation in question. The court specifically noted that during the meetings Reed had with managers following the incident with the mechanic, Reed never indicated that she had a disability which can lead to episodes of rage, or that she needed an accommodation. All that occurred was that Pelletier made the same suggestion to Reed that he would have made to any other employee who had had a confrontation with a coworker. The court held that although Reed attempted to "dress up" this advice, thus giving her special permission to walk away even from supervisors, her argument ignored the context in which the advice was given.

4. Seventh Circuit Holds That Transfer Was Reasonable Accommodation

Tyler v. Ispat Inland, Inc., 11 A.D. Cas. (BNA) 1136 (7th Cir. Apr. 5, 2001): Kenneth Tyler has worked for Ispat Inland, Inc., most recently as an electrician, since 1979. In the early 1990's, Tyler began to feel threatened by his coworkers at Ispat's Plant 2 and made several unsubstantiated allegations. In 1994, Tyler's doctor concluded that he was "unable psychologically to handle stress," restricted him to working the day shift and referred him to a psychiatrist. He was subsequently diagnosed by the psychiatrist as suffering from "Atypical Depression R/O Delusional Disorder Persecutory," and was taken off work indefinitely. When he returned to work, he was transferred to Plant 7 in the hopes that separating him from the individuals he complained about would solve the problem. He received the same wages and benefits at Plant 7 that he had received at Plant 2. Unfortunately, Tyler came to believe that his coworkers at Plant 7 were harassing him as well. Although Tyler requested that Ispat transfer him back to the original plant, Ispat declined to do so. Tyler indicated to the human resources manager at one point that the only thing that would make him feel safe at work would be to confront the Plant 2 employees (with whom he no longer worked) and investigate his allegations. Tyler sued under the ADA, alleging a failure to accommodate. The district court granted summary judgment, finding that Tyler suffered no adverse employment action and that the company had reasonably accommodated him.

The Seventh Circuit affirmed, agreeing with the lower court that Tyler had suffered no adverse employment action because Tyler's salary and benefits remained the same after his transfer, and the transfer was satisfactory to him at the time because it removed him from the alleged harassment. Tyler also alleged a failure to accommodate, arguing that the transfer was not a reasonable accommodation, that the appropriate reasonable accommodation at the time of his transfer would have been to fully investigate his concerns and assure his safety, and that after two years at Plant 7, the appropriate accommodation would have been to transfer him back to Plant 2. The court rejected these arguments, noting that because of Tyler's medically diagnosed paranoia and delusions of persecution which caused him to fear his coworkers at Plant 2, the best way to allay his fears short of psychological treatment would be to physically separate him from the employees he feared. The court also rejected Tyler's assertion that the company should have investigated his allegations, noting that because Ispat knew Tyler experienced delusions of persecution, "reason did not require the company to expend resources to investigate his accusations or to take unnecessary safety precautions on his behalf." Finally, the court rejected Tyler's contention that a reasonable accommodation after two years at Plant 7 would have been a transfer back to Plant 2. Although Tyler's physician made the request, he never indicated that Tyler could not handle the stress at Plant 7, nor did he explain why a transfer would alleviate Tyler's concerns or why Tyler needed to confront his former coworkers. Additionally, when Ispat asked to examine Tyler's medical records to evaluate the propriety of the requested accommodations and to develop further appropriate accommodations, Tyler refused to release them. The court noted that without a medical explanation for a transfer back to Plant 2, "old-fashioned common sense dictated that he be kept away from the original source of his stress."

5. Sixth Circuit Reverses Judgment for Employer Where Evidence Showed That Employer Did Not Require All Employees To Be Fully Functional Under Job Rotation Concept

Kiphart v. Saturn Corp., No. 97-00054 (6th Cir. May 31, 2001): Jeffrey Kiphart, a Saturn employee who suffers from various hand, arm and neck impairments which restrict his mobility, was placed under permanent lifting and repetitive motion restrictions. Saturn removed Kiphart from his work team, moved him through a series of temporary jobs, and finally placed him on involuntary medical leave for seven months. Kiphart sued under the ADA, alleging a failure to accommodate. In his lawsuit, Kiphart alleged that Saturn improperly used its concept of job rotation, under which each member of a work team rotates through each of the jobs assigned to the team, to justify its refusal to place him on any team assigned one or more tasks he could not perform. Kiphart based his claims on the "gulf he says exists between the theory of job rotation and its practice at Saturn." The jury found for Kiphart but the district court ordered the clerk not to enter the verdict and six months later, it granted Saturn's in-trial motion for judgment as a matter of law. The Sixth Circuit, however, reversed and remanded.

Saturn Corp. employs the concept of team rotation, where workers are grouped into teams, each of which is responsible for one step of the manufacturing process. Each team member would learn and perform each task required to accomplish the team's responsibilities. The team members would rotate through the team tasks throughout the work day. Although Saturn characterized job rotation as a "building block" of the Saturn Corporation, Kiphart argued that in practice, team members frequently did not fully rotate and instead swapped tasks with other team members. Witnesses at trial explained that this practice grew out of either personal aversion to certain tasks or physical inability to perform some tasks.

While some Saturn employees testified as to the essential role of the job rotation concept, Kiphart provided significant evidence to the contrary, including testimony from numerous employees that the teams simply did not operate as envisioned under the job rotation system. Testimony included the fact that on some teams, members swapped tasks among themselves to satisfy personal preferences--apparently with the knowledge of management. Some witnesses testified they knew of not

one team that fully rotated job tasks, and further stated their belief Saturn was not harmed by the partial adherence to the job rotation system. In fact, the evidence presented suggests that, prior to 1997, the only time Saturn fully implemented its job rotation concept was when it placed employees with medical restrictions; only then did it require applicants for permanent openings to be fully functional and fully rotational. For these reasons, and based on Kiphart's testimony that even with his restrictions, he frequently was able to perform all but one or two team tasks, the Sixth Circuit found that Saturn violated the ADA in failing to reasonably accommodate Kiphart.

6. Sixth Circuit Holds That Relocation May Be a Reasonable Accommodation

EEOC v. United Parcel Service, Inc., No. 99-4367 (6th Cir. May 7, 2001): The EEOC filed suit under the ADA on behalf of William Woods, a UPS driver in Austin, Texas. Woods developed a reaction to a serious allergen in the Austin area and was advised by his physician to leave central Texas. Citing company policy, UPS refused Woods' requested accommodation, a transfer to Kentucky, but suggested that he resign his position in Texas and re-apply for a job with UPS in Ohio. Woods resigned his job, moved his family to northern Kentucky, and applied for a job with UPS in Cincinnati. UPS, however, informed Woods he would not be rehired, citing company policy which barred the hiring of former employees.

The district court granted UPS' motion for summary judgment. The Sixth Circuit reversed, first noting that although the district court had divided Woods' allegations into two separate claims—failure to transfer and failure to rehire—the proper analysis was that of an ongoing interactive process which did not result in an adverse employment action until Woods was denied the job in Cincinnati. The court initially addressed UPS' contention that Woods was not disabled because he was able to perform his job duties in Texas without accommodation, and he no longer suffered the effects of his allergies once he left central Texas. The court, noting evidence that Woods' symptoms were worsening over time, that he spent nearly all of his non-working hours in bed, and that his wife had assumed responsibility for his household duties and correspondence, held that a reasonable jury could find that Woods was properly "disabled" under the statute at the time he sought the accommodation of relocation. The court also rejected UPS' argument that Woods did not suffer an adverse employment action because he voluntarily resigned his position in Texas, pointing to the fact that Woods' resignation was not truly voluntary because it was "encouraged by his employer as a purportedly necessary step in accommodating his disability."

7. Medical Leave of Indefinite Duration Not a Reasonable Accommodation

Cousins v. Howell Corp., 113 F. Supp. 2d 262 (D. Conn. 2000). Arlene Cousins was employed as a customer service representative for two years. In June 1996, her doctors diagnosed her with a variety of gall bladder problems that ultimately would require surgery. Following this procedure, Cousins underwent additional procedures relating to ongoing gall bladder problems until April 1997. During this time, she did not work and the company was forced to hire temporary workers to cover her position. Eventually, Howell hired one of these temporary workers to perform Cousins' position on a permanent basis. In May 1997, Cousins notified Howell that she was able to return to work on a part-time basis. However, because it had no position available for her, Howell refused either to return Cousins to her previous position or to create a new "filing clerk" position for her. Because of these actions, Cousins requested that Howell give her a "pink slip" so that she could recover unemployment compensation. Howell complied with this request.

The court rejected Cousins' claims of disability discrimination on two grounds. First, the court held that Cousins was not otherwise qualified to perform the essential functions of her position at the time of her termination. Because medical leave of an indefinite duration is not a reasonable

accommodation, the court noted that Cousins failed to suggest any accommodation that could have been offered to her that would have permitted her to perform her duties. Under these circumstances, where Cousins had been out of work for more than eight months and was facing yet another surgery, Howell could not guarantee that Cousins would ever return. Because of this uncertainty, forcing the employer to grant medical leave without a foreseeable end, the court held, would not be reasonable. Accordingly, no reasonable accommodation would permit Cousins to perform the essential functions of her position.

In addition, the court held that Howell did not regard Cousins as disabled for the purposes of the ADA. Cousins' undisputed evidence suggested that Howell offered her another position with many of her former job duties and responsibilities. By offering her another job, Howell demonstrated that it did not regard her as substantially unable to perform the essential life activity of working. Because Howell did not regard Cousins to be disabled, the court therefore granted summary judgment in favor of the employer.

8. Additional Leave Time Not a Reasonable Accommodation Absent Evidence That It Would Aid in the Employee's Performance of Her Job

Riley v. Fry, No. 98 C 7584, 2000 U.S. Dist. LEXIS 14541 (N.D. Ill. Oct. 2, 2000). Mary Riley worked as an Assistant Public Defender from 1981 until her termination in October of 1997. In 1990, however, Riley was diagnosed with vulvadynia, a condition that causes severe vaginal pain. According to Riley's testimony, the condition caused her such excruciating pain that she often could not think, much less talk. Moreover, because of the pain, Riley could not represent clients. This condition caused Riley to take a nine-month leave of absence in 1990. Upon her return, she worked five months and then took a 25-month leave of absence, returning in April 1993. Based on her request for an accommodation, Riley was transferred to another court in 1994 where she worked for four months. In November and December 1994, she began another leave of absence which turned into a maternity leave that ended in July 1995. In August 1996, Riley again took another 11-month leave that ended in July 1997. During the month of July, however, she worked only two days. At the end of the month, Riley requested and received yet another leave of absence. The undisputed evidence showed that during a seven-year period, Riley was absent more than two-thirds of the time.

The court found that representing clients, thinking and communicating, and arriving to work regularly all were essential functions of the employee's position as an Assistant Public Defender. Because Riley testified that the pain caused by her condition often prevented her from adequately representing her clients, the court found that she could not perform the essential functions of her position. Accordingly, she was not otherwise qualified for the job as an Assistant Public Defender.

In addition, her absences prevented any reasonable accommodation of her disability. As the court recognized, there are limits as to how far an employer must go in granting medical leave. An employer is only required reasonably to accommodate an employee if those reasonable accommodations would permit the employee to perform his or her job. Further medical leaves of absence, however, would not permit Riley to perform the job, but rather would serve only to increase the percentage of time that she was absent. In light of her exceptionally poor attendance record, therefore, the court held that no reasonable accommodation could be made to permit Riley to perform the essential functions of her position. Accordingly, the court granted summary judgment in favor of the employer.

9. Proposed Accommodation Exempting Employee from Performing Essential Functions of Her Job Was Not Reasonable

Wilburn v. Lucent Techs., Inc., No. 3:98-CV-2581-L, 2000 U.S. Dist. LEXIS 17520 (N.D. Tex. Nov. 30, 2000). Lucent Technologies employed Sheila Wilburn as a production specialist.

Because of extreme pain in her back and legs resulting from sciatica and disc disruption syndrome, she was placed on permanent medical restrictions in 1997. These restrictions prohibited lifting, pushing, or pulling more than five pounds. In addition, the medical restrictions required that she be allowed to sit, stand, and walk as needed to alleviate the pain. Lucent provided Wilburn with an accommodation in the production specialist position, allowing her to obtain assistance from a co-worker if she encountered any take that she could not perform due to her medical restrictions.

In 1997, Wilburn sought a promotion to a position as a Machine Setter. After receiving a copy of Wilburn's work restrictions, however, her supervisor investigated the requirements of the Machine Setter position and concluded that Wilburn could not perform the essential functions of the position without violating the work restrictions. The supervisor removed Wilburn from a training class, thereby preventing her from qualifying for a future position as a Machine Setter. Based on this action, Wilburn filed suit, alleging that Lucent's failure to promote her constituted unlawful discrimination on the basis of her disability.

Lucent contended that the position of Machine Setter substantially conflicted with Wilburn's medical restrictions then in effect. Nevertheless, Wilburn contended that she could perform those functions if given the same accommodation that Lucent provided her in her current position: allowing her to obtain the assistance of a co-worker if she encountered a task that she could not perform within her medical restrictions.

This proposal, however, did not constitute a reasonable accommodation within the ADA. The court found that as a matter of law, it is an unreasonable accommodation for the employer to be required to exempt the employee from performance of the essential functions of the job. Moreover, the law does not require the employer to transfer any of the essential functions of an employee's job. The accommodation requested by Wilburn would have required exempting her from the essential functions of the position and would have created a light-duty position. According to the court, such an accommodation is not a reasonable one. Moreover, even if the accommodation were reasonable for the position of a production specialist, that does not necessarily imply that it would be reasonable for the position of Machine Setter. Therefore, the court rejected Wilburn's argument that present accommodations must be applied to the position to which she sought to be promoted, and entered summary judgment in favor of the employer.

10. Additional Leave Not a Reasonable Accommodation Where Employee's Condition Would Never Improve

Hummel v. County of Saginaw, 118 F. Supp. 2d 881 (E.D. Mich. 2000). The Saginaw County Sheriff's Department employed Bonnie Hummel as a building security officer. In October 1994, Hummel informed the Department that she had been diagnosed with adenosquamous carcinoma of the upper lobe of the left lung. At that time, she requested and received a medical leave of absence to facilitate treatment. Pursuant to the relevant absence control provisions of the collective bargaining agreement, the Department terminated Hummel when she did not return to work after one year on leave. Because of this action, Hummel filed suit, alleging disability discrimination.

As a reasonable accommodation, Hummel argued that the Department could have provided her with additional leave time. However, the Department produced credible medical testimony which suggested that Hummel could not perform the essential functions of the position even with additional leave and that her condition was unlikely to improve. Absent any medical testimony to the contrary, the court found as a matter of law that Hummel was not otherwise qualified for her previous position as a building security officer and therefore granted summary judgment in favor of the Department.

11. Forklift Driver Restricted from Driving Forklift Not Qualified for His Position

Ketcher v. Wal-Mart Stores, Inc., 122 F. Supp. 2d 747 (S.D. Tex. 2000). Larry Ketcher began his employment with Wal-Mart on February 27, 1995, at the Wal-Mart distribution center in Palestine, Texas and worked as a replenishment driver operating a stock picker forklift. The forklift is a piece of heavy machinery, weighing some 7,600 pounds, that enables a worker to remover product from pallets that are housed on racks reaching as high as 26 feet above a warehouse floor. Despite having no hearing capability in his left ear and suffering from a 70% hearing loss in his right ear, Ketcher performed his job without incident for more than two years. In September 1997, however, Ketcher became afflicted with an anxiety disorder and began taking medication to control this condition. Following a month-long medical leave of absence, Ketcher sought to return to work in October 1997. As a condition of his return, however, Wal-Mart demanded that Ketcher produce a medical release. Unable to produce such a letter, Ketcher never again worked at the distribution center, and instead chose to file suit.

The court, in granting Wal-Mart's motion for summary judgment, noted that at a minimum, a replenishment driver must be able to operate a forklift. The evidence, however, conclusively established that Ketcher's medical restrictions prevented him from operating heavy machinery. In light of these restrictions, Ketcher was not otherwise qualified for the position. Moreover, Wal-Mart did not discriminate against Ketcher by requiring a medical exam or demanding that he produce a full medical release before returning to work. Once a symptom of an employee's condition manifests itself in such a way that danger becomes foreseeable rather than merely speculative, an employer is permitted to require a medical examination consistent with business necessity. The Act permits employers to make inquiries to require medical examinations when there is a need to determine whether an employee is still able to perform the essential functions of his position. Because Ketcher, an operator of heavy machinery, had advised Wal-Mart that he was suffering from dizziness, the employer properly exercised its right to request a physician's certification of what activities Ketcher could and could not perform. Wal-Mart had no duty to continue allowing Ketcher to work as a replenishment driver without undertaking this relevant medical inquiry. Therefore, Wal-Mart's actions were wholly consistent with the ADA.

12. Employers Are Required To Engage In Interactive Process With Employee To Determine Reasonable Accommodation; Disabled Employees Should Have Priority in Reassignment, Unless Employer Can Prove Undue Hardship

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2001)(en banc). Robert Barnett worked for ten years as a customer service agent for U.S. Air. He injured his back while working in a cargo position. His doctor recommended that he avoid lifting and excessive bending, twisting, turning, pushing and pulling. The doctor concluded that Barnett could perform the job requirements of the swing-shift mail room position. Two employees with greater seniority than Barnett, however, exercised their seniority right to transfer to the mail room. Once bumped, Barnett's seniority limited him to transferring to jobs in the cargo area. Barnett wrote to his manager and requested that he be allowed to stay in the mail room as a reasonable accommodation under the ADA. Five months later, U.S. Air informed Barnett that he would be removed from the mail room and placed on job injury leave. There was no substantive discussion of Barnett's accommodation request. Barnett then sent another letter to his manager suggesting two alternative means of accommodating his disability. He requested that he either be provided with special lifting equipment in the cargo area or that his job be restructured so that he would do only office work. U.S. Air denied Barnett's second request for accommodation but informed him that he could bid for any job within his restrictions. Barnett filed suit, alleging that U.S. Air violated the ADA by failing to engage in an interactive process to determine a reasonable accommodation of his disability and by failing to reassign him to the mail room, despite the company's seniority system. The district court granted U.S. Air's motion for summary judgment.

On appeal, the Ninth Circuit Court of Appeals, sitting en banc, reversed the summary judgment on Barnett's interactive process and failure to reassign claims. The court held that employers are required to engage in an interactive process with employees in order to identify and implement appropriate reasonable accommodations. The mandatory process, the court held, is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process. The Ninth Circuit noted that the interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The court added that both sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process. The court stated:

> Employers should meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered the employee's request, and offer and discuss available alternatives when the request is too burdensome. The interactive process requires that employers analyze job functions to establish the essential and nonessential job tasks. In order to identify the barriers to job performance, employers must consult and cooperate with disabled employees so that both parties discover the precise limitations and the types of accommodations which would be most effective. The evaluation of proposed accommodations requires further dialogue and an assessment of the effectiveness of each accommodation, in terms of enabling the employees to successfully perform the job. Once the employer and employee have identified and assessed the range of possible reasonable accommodations, the legislative history directs that the expressed choice of the applicant shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity.

The Ninth Circuit held that employers who fail to engage in the interactive process in good faith face liability for the remedies imposed by the ADA if a reasonable accommodation would have been possible. The court further held that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in the interactive process in good faith. The Ninth Circuit concluded that the district court erred in granting summary judgment to U.S. Air on Barnett's claim that the company had failed to engage in the interactive process in good faith.

Barnett also argued on appeal that it would have been a reasonable accommodation for U.S. Air to allow him to remain in the mail room by making an exception to its seniority policy. The court held that reassignment is a form of reasonable accommodation pursuant to the ADA and a seniority system is not a per se bar to reassignment. However, the court added, a seniority system is a factor in the undue hardship analysis and a case-by-case, fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer. The Ninth Circuit stated, "If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees." Summary judgment for U.S. Air, the court concluded, was therefore inappropriate.

On April 16, 2001, the United States Supreme Court granted certiorari in this case.

13. Flexible Schedule May Be a Reasonable Accommodation

Ward v. Massachusetts Health Research Inst., 209 F.3d 29 (1st Cir. 2000). Ward was hired in 1991 as a data entry assistant. The employer permitted employees to begin work any time between 7:00 a.m. and 9:00 a.m., and to leave after working seven and a half hours. In early 1992, Ward started arriving late, and came to work on occasion as late as 12:00 noon. He was warned about his tardiness in his December 1992 and July 1993 performance reviews. He informed his supervisor that he was late because his inflammatory arthritis caused stiffness, swelling and pain in the mornings. In August 1993, he was issued a written warning that further tardiness would result in disciplinary action up to and including dismissal. He then requested a modified work schedule to accommodate his disability. His request was denied. He was told that the two-hour morning attendance "window" was sufficiently flexible to accommodate his arthritis. In March 1994, Ward was late on two consecutive days and was terminated for excessive tardiness. He sued, alleging violations of the ADA. The District Court granted the employer's motion for summary judgment and Ward appealed.

The First Circuit rejected the employer's argument that because of the need to supervise Ward's work, "attendance during prescribed work hours" was an essential function of his job. Instead the court noted that he was terminated for tardiness, not performance problems, and that his job did not require overlap with other employees. The court also found that the time-sensitivity of his work only required that it be completed before the lab opened the following morning. The court therefore held that a reasonable fact finder could conclude that a regular and predictable schedule was not an essential function of his position. The employer failed to produce any evidence that the requested accommodation (*i.e.*, an open-ended schedule) would impose an undue hardship. Accordingly, the court reversed the district court's grant of summary for the employer and remanded the case for further proceedings.

14. Employer Has Duty To Assist Disabled Employee in Locating Jobs Within Company That Employee Could Perform

Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011 (8th Cir. 2000). Cravens worked for Blue Cross for eighteen years in different capacities from 1977 until her termination. In late 1993, she assumed the position of Senior Operations Specialist that required a substantial amount of "keying" or typing claim information into the computer system. In June 1995, plaintiff sought medical treatment for pain in her wrists; she was placed on a temporary restriction to avoid repetitive motion and to refrain from keying. In late July 1995, she was diagnosed with bilateral carpal tunnel syndrome and thus permanently restricted to no or minimal keyboard activity. On August 16, 1995, she was given twelve weeks to find another position with Blue Cross by using its internal application process. She was terminated on October 31, 1995. Cravens sued, alleging violations of the ADA for the employer's failure to reassign her. The district court granted summary judgment in favor of the employer and found that she failed to establish that she was a qualified person since she could not perform the essential function of "keying." Cravens appealed.

The Eighth Circuit noted that the ADA's definition of a qualified person is "an individual with a disability who . . . can perform the essential functions of the employment position that such individual holds or desires." The court rejected the employer's argument that the language "desires" applies only to applicants and that Cravens was required to perform the essential functions of the job she held. Additionally, the court held that it is the employer's obligation under the ADA to ascertain whether the employer has some job that the employee can fill, and to assist the employee in locating those jobs that the employee could perform. The court therefore found there was a genuine issue of material fact as to whether the employer acted in good faith and engaged in the interactive process, and remanded the case for further consideration.

15. Airline Not Required To Overlook the Most Qualified Employee as Part of Its Duty of Reasonable Accommodation

Ladenheim v. American Airlines, 115 F. Supp. 2d 225 (D.P.R. 2000). Lisa Gelabert Ladenheim worked for American Airlines at the San Juan, Puerto Rico hub as a passenger services agent. During the course of her employment, Ladenheim suffered an injury to her left hand, for which she was treated by the State Insurance Fund. After her treatment, Ladenheim returned to work and was assigned to a temporary light duty position as a curbside area employee. When it became apparent that Ladenheim's injury had resulted in her permanent impairment with carpal tunnel syndrome, American removed her from the temporary position and placed her on sick leave while the airline sought another position for her. While on leave, Ladenheim applied for three positions, none of which were awarded to her. Following these rejections, Ladenheim filed suit, alleging that American's refusal to accommodate her constituted a failure reasonably to accommodate her.

Rejecting Ladenheim's claims, the court first recognized that under the ADA, reasonable accommodation may include reassignment to a vacant position. On the other hand, an employee is not entitled to be reassigned to the position of his choice. Further, the ADA does not mandate a policy of affirmative action in favor of individuals with disabilities by requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. Accordingly, the ADA does not require an employer to reassign a disabled employee to a position for which, in the employer's judgment, the disabled employee is not the most qualified applicant. Because she was not the most qualified applicant for the positions for which she applied, American passed over Ladenheim in favor of the most qualified applicant. In so doing, according to the court, the airline did not violate its duty to reasonably accommodate Ladenheim's carpal tunnel syndrome. The court therefore entered summary judgment on behalf of American.

16. Employer May Provide Alternate Training for Disabled Employees

Lane v. Wal-Mart Stores, Inc., No. CCB-99-763, 2000 U.S. Dist. LEXIS 13935 (D. Md. Aug. 28, 2000). Wal-Mart hired Renee Lane to work in its seasonal goods section. During the interview, Lane told Wal-Mart that she suffered from various learning disabilities. These learning disabilities diminished Lane's ability to understand instructions quickly and decreased her attention span. Consequently, consistent with company policy, Wal-Mart did not compel Lane to undergo the training normally required of similarly-situated employees. Rather, Wal-Mart provided Lane with individualized training with her supervisor. As part of a reduction in force, however, Wal-Mart terminated Lane in January 1997. Following her termination, Lane brought a civil action alleging, among other things, that Wal-Mart discriminated against her by not providing her training similar to other employees.

The court recognized that the ADA prohibits discrimination against disabled employees with regard to the terms and conditions of employment, which include training provided by the employer to its employees. An employer may, according to the court, provide alternate training for disabled employees so long as the alternate training is not inferior to that provided to non-disabled employees. Because the training provided to Lane differed only in format and not in content, the court held that such a variation did not constitute disability discrimination. Accordingly, the court granted summary judgment in favor of Wal-Mart.

17. Requiring Manager To Drive Epileptic Employee To Bank To Make Store Deposits, Or Hiring A Driver To Do So, Were "Plausible Accommodations"

Lovejoy-Wilson v. NOCO Motor Fuel, Inc., No. 00-7919, 2001 U.S. App. LEXIS 19511 (2d Cir. Aug. 31, 2001). Diane Lovejoy Wilson suffered from epilepsy and experienced seizures of

varying seriousness on a daily basis. Because of her epilepsy and New York State's requirement that an epileptic be seizure-free for two years in order to obtain a driver's license, Lovejoy was unable to drive. Lovejoy was employed by NOCO at gasoline service stations and associated convenience stores. Lovejoy began her employment with NOCO as a clerk in store number 44 ("S-44"), which was located six blocks from her home. In late 1992, Lovejoy told her supervisors that she suffered from epilepsy. In December of that year, she began applying for a promotion to assistant manager of S-44, but was repeatedly denied the promotion because of her inability to drive. According to NOCO, the reason that assistant managers were required to be able to drive was to permit them to use their automobiles to take their stores' receipts to the bank for deposit. Lovejoy filed suit, asserting that denying her the promotion she sought because of her disability violated the ADA. The district court concluded, however, that while Lovejoy was a qualified individual with a disability, she had not been constructively discharged. The court entered judgment dismissing the complaint in its entirety.

On appeal, the Second Circuit noted that under the ADA, the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." The court concluded that a reasonable jury could find that with reasonable accommodation Lovejoy could perform the essential functions of the job she sought. NOCO did not contend that driving was an essential function of the position of assistant manager. Rather, the evidence disclosed that depositing store receipts in a safe and timely manner was an essential function of an assistant manager's job. The question, then, was whether, as a matter of law, the plaintiff was incapable of performing that function with a reasonable accommodation. NOCO failed to demonstrate that the only way to satisfy the need for an assistant manager to deposit cash in the bank was for that assistant manager to drive herself to the bank. Lovejoy suggested several "plausible accommodations" to enable her to be promoted at S-44, including having the manager of a nearby store drive her or hiring a car service or a driver at her own expense. The proposed accommodations were not, facially, an "undue hardship". Therefore a rational jury could find that Lovejoy was able to perform the essential functions of the assistant manager position at S-44 with a reasonable accommodation. Further, a jury could reasonably find that NOCO did not reasonably accommodate Lovejoy's disability. NOCO asserted that by giving Lovejoy an assistant manager's job at an armored car store, it provided Lovejoy with a reasonable accommodation and that it therefore fulfilled its obligations under the ADA. However, the court held that offering the position at an armored care store was not, as a matter of law, a reasonable accommodation. The court held that if an employer permits its workers to apply for promotion at a preferred location (or shift), then a disabled person must have the same opportunity. In this case, the evidence indicated that NOCO employees could apply for promotion at a particular store. Because employees could apply for promotion to assistant manager at stores of their choice, Lovejoy had the right to seek the assistant manager job at the store she desired-- S-44 -- free from discrimination. The court concluded that summary judgment for NOCO was inappropriate because a rational jury could find that such a reasonable accommodation was available but not offered to Lovejoy.

18. Employer Not Required To Create A Position To Reasonably Accommodate A Disability

Lucas v.W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001). Grainger hired William Lucas to work as a Material Handler. Though Lucas was hired as a Material Handler, he began training for the position of Will-Call Service Representative soon after he was hired. The Will-Call job consisted primarily of performing physical labor in Grainger's warehouse. However, unlike Material Handler, the Will-Call job also involved a significant amount of interaction with Grainger's customers, and it is considered a promotion from Material Handler. Lucas trained for the Will-Call job for several months. By April of 1994, though, Grainger needed someone to handle customer telephone calls and it decided to train Lucas for the job of Customer Service Representative instead. The Customer Service Representative position was essentially a desk job. Lucas performed Customer Service Representative duties for much of 1994. During that time, several customers complained about his phone demeanor. Due to the complaints,

Grainger moved Lucas back to working in the warehouse. In May of 1996 Lucas injured his back while unloading a trailer. In June of 1996, Lucas returned to work and presented a note from his doctor. The note permitted Lucas to perform office work that did not entail manual labor. At the time, there were no openings at the facility for office jobs, so Stewart temporarily displaced two employees from their jobs in order to allow Lucas to take over their office duties. The displaced employees performed the warehouse duties that Lucas would have performed. Lucas made a request for an accommodation in the form of a permanent job that entailed "desk work." At that time there were no desk jobs available. Lucas remained on workers' compensation leave for nearly one year. Then, in June of 1997, Grainger offered him a job as a Bins Sorter at its Zone Distribution Center. Grainger had created the Bins Sorter position by identifying certain existing jobs at the Distribution Center, and combining those duties into a job that Grainger felt Lucas could perform given his work restrictions. Grainger sent a typed form entitled "Job Description" to Lucas' physician. The form briefly described what it called the "Essential Job Functions" of the Bins Sorter position, listed the job's physical requirements, and indicated that modifications to those requirements were possible. The doctor made some changes to the Essential Job Functions part of the Job Description form. First, where the form indicated that a Bins Sorter was "occasionally" required to squat or kneel, the doctor entered "Not at all." Second, where the form indicated that a Bins Sorter was "occasionally" required to lift or carry "up to 40-50 lbs.," and was "frequently" required to lift or carry "up to 10-25 lbs.," he again entered "Not at all." The doctor then checked a blank space marked "Approved" at the bottom of the form, signed the form, and returned it to Grainger in September of 1997. Grainger did not offer the doctor's modified version of the Bins Sorter position to Lucas. Lucas never returned to work with Grainger after he went on workers' compensation leave.

The Eleventh Circuit concluded that Lucas failed to establish that Grainger discriminated against him because of his disability. Lucas contended that Grainger discriminated by not reassigning him to the Customer Service Representative position at the Marietta Boulevard facility. The court found no merit to this argument, because even if it was assumed that Lucas was otherwise qualified to perform the duties of that position, notwithstanding the prior customer complaints about his lack of interpersonal skills, there were no vacancies in that position, or in any other position involving desk work. Lucas also contented that Grainger discriminated against him by not reassigning him to the Distribution Representative position at the Distribution Center. However, that job required physical labor. Lucas failed to show he was "otherwise qualified" for the Distribution Representative position, because he could not perform the essential function of engaging in the physical labor necessary to prepare orders for shipment on the packing line.

F. Testing To Measure Abnormal Wrist Neurometric Readings

Equal Employment Opportunity Commiss'n v. Woodbridge Corp., No. 01-1045, 2001 U.S. App. LEXIS 19027 (8th Cir. Aug. 24, 2001). The EEOC brought suit on behalf of nineteen workers at Woodbridge, a producer of polyurethane foam pads used in automobile seats, who were denied employment based upon the results of a test designed to reflect abnormal wrist neurometric readings. Woodbridge contended that the test was intended to determine those applicants who were more likely to develop carpal tunnel syndrome. The test was tailored for the repetitive motion required for those working on a specific foam line in a plant in Kansas City. Several applicants were tested, and those applicants with abnormal neurometry readings were not hired for the foam line production position although they were considered to be eligible for jobs in other areas within the plant. The EEOC contended that Woodbridge discriminated against the nineteen applicants on the basis of a perceived disability, because, according to the EEOC, Woodbridge regarded the applicants as substantially limited in the ability to work. The district court granted summary judgment to Woodbridge.

On appeal, the EEOC contended that Woodbridge regarded the nineteen applicants as substantially limited the major life activity of working. The Eighth Circuit held that the facts alleged by

the EEOC were insufficient to show that Woodbridge regarded the nineteen applicants as being substantially limited in working. The court noted that the wrist neurometric test was conducted on all applicants, and some of those who received abnormal results were employed in jobs other than the foam production jobs. The court noted that the relevant query was whether the nineteen applicants were regarded as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill, and abilities." The evidence reflected that the test administered was specifically designed for the activities required on a specific foam line job in a specific plant. Thus, Woodbridge did not regard the nineteen applicants as substantially limited in the major life activity of working because Woodbridge considered the applicants as being disqualified from only a narrow range of jobs.

XII. EEOC ENFORCEMENT GUIDANCE ON APPLICATION OF ADA TO CONTINGENT WORKERS

A. Introduction

On December 22, 2000, the EEOC issued its Enforcement Guidance on Application of ADA to Contingent Workers. Citing a background where less than one-third of Americans with severe disabilities are employed, and a recent study suggesting that employment through the employment staffing firm industry can provide "[a] critical means for people with disabilities to move from unemployment to competitive permanent employment,"the EEOC issued the Guidance to clarify whether the provisions of Title I of the Americans with Disabilities Act applies to staffing firms and their clients.

B. Staffing Firm Liability

1. A staffing firm or its client that qualifies as an employer of a staffing firm worker may be liable for:

   a. its own discrimination against the worker; or

   b. discrimination by the other entity if it either:

      (1) participates in the discrimination; or

      (2) knew or should have known of the discrimination and failed to take corrective action within its control.

2. A staffing firm that does not qualify as a worker's employer may still be liable for discrimination if it:

   a. interferes with the worker's ADA rights;(13) or

   b. qualifies as an employment agency, in that it refers potential employees to employers or provides employers with the names of potential employees.

3. A client that does not qualify as a staffing firm worker's employer still may be liable if it interferes with the worker's ADA rights, except if that client is a federal agency.

C. Disability-Related Inquiries and Medical Examinations

1. General

a. A covered entity, including a staffing firm, may not make disability-related inquiries or require medical examinations before making an offer of employment. A covered entity may do several things before an offer of employment, however, to evaluate whether an applicant is qualified for the job, including asking about an applicant's ability to perform specific job functions; asking about an applicant's non-medical qualifications and skills, such as education, work history, and required certifications and licenses; and asking applicants to describe or demonstrate how they would perform job tasks.

b. A covered entity may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation to perform the functions of the job. This is

because these questions are likely to elicit information about whether an applicant has a disability. Under certain circumstances, however, a covered entity may ask an applicant whether she or he needs a reasonable accommodation to perform the functions of the job, and if so, what type. These questions are permitted where:

(1) the covered entity reasonably believes that the applicant will need a reasonable accommodation because of an obvious disability;

(2) the covered entity reasonably believes that the applicant will need a reasonable accommodation because of a hidden disability that the applicant has voluntarily disclosed; or

(3) an applicant has voluntarily disclosed that s/he needs a reasonable accommodation to perform the job.

c. A covered entity may ask disability-related questions or require medical examinations after it has made an offer of employment and before the applicant begins work duties, if it does so for all entering employees in the same job category, regardless of disability.

d. Disability-related inquiries and medical examinations of employees are permitted only if they are job-related and consistent with business necessity or in other limited circumstances.

2. Offer of Employment

Because an employer has considerable latitude in asking disability-related questions or requiring medical examinations *after* an offer of employment has been made, it is critical to determine what constitutes a job offer in the context of staffing firm arrangements.

a. A staffing firm's offer to place an individual on its roster for possible consideration in the future for temporary work assignments with its clients does not constitute an "offer of employment" under the ADA. None of the factors indicating a relationship of employment between an individual and a staffing firm or staffing firm's client exist when the individual is placed on the roster.

Typically, a staffing firm and an individual applying for a temporary work assignment with the staffing firm do not intend to create an employer-employee relationship at this stage. The parties merely agree that: (1) the staffing firm will consider the individual for specific work assignments in the future; and (2) the individual will consider accepting assignments in the future depending on his or her availability and the desirability of the assignment. Additionally, no job functions or duties are performed until after the staffing firm worker accepts an offer of an assignment with a client.

Performance of job functions is implicitly included among the factors that show that a relationship is one of employment. For example, the most critical factor--the staffing firm's and/or client's control over when, where, and how the worker performs work duties--is necessarily absent when no job functions are being performed.

b. A job offer generally occurs when a staffing firm worker is given an assignment with a particular client. After a staffing firm offers an individual an actual work assignment with one of its clients and the individual accepts the offer, the factors indicating an employment relationship are present. Once an individual has been given an assignment with a client, the staffing firm typically pays wages, withholds taxes and social security, and provides benefits and workers' compensation coverage to the individual, while the client typically controls when, where, and how the individual performs work duties.

Therefore, a staffing firm or client violates the ADA if it asks disability-related questions or requires a medical examination of an individual before an assignment to a particular client is made.

c. Some staffing firms have contracts with numerous clients to provide similar services on a long-term basis, such as janitorial, security, landscaping, etc. Typically, such firms place their own employees, including supervisors, at the clients' work sites and assume full operational responsibility for providing ongoing services. Under such circumstances, an offer of employment may occur prior to the designation of a particular location where work is to be performed, as long as the workers are guaranteed positions somewhere and specific assignments are made soon after the offer.

(1) *Example*: Clean Sweep is a contract firm that hires workers to perform housekeeping duties at its clients' offices. Clean Sweep assumes full operational responsibility for providing housekeeping services. Because of the high turnover in housekeeping jobs, Clean Sweep knows that each week several positions will become available at its clients' offices, but it often does not know which clients will need workers until a day or two before the assignment is supposed to begin. Clean Sweep tells CP to report to its office on Monday morning at 8 a.m. to be given an assignment. Clean Sweep has made CP an offer of employment.

d. After a staffing firm offers an applicant an actual work assignment with a client and before his or her duties begin, the staffing firm or client may ask any disability-related questions or require any medical examinations it chooses, as long as it does so for all individuals entering the same job category. The offer of a work assignment may be conditioned on the results of post-offer disability-related questions and medical examinations.

e. If, however, a qualified individual is screened out because of a disability, the staffing firm or client must show that the exclusionary criterion is "job-related and consistent with business necessity," and that there was no reasonable accommodation that would have enabled the individual to meet the criterion. In addition, if an offer is withdrawn for reasons related to safety, the employer must show that the individual poses a "direct threat."

f. If a staffing firm or client requires a medical examination, a staffing firm may revoke an offer of employment if the results of the examination are not received before the assignment begins. Because the ADA allows an employer to obtain medical information only after an offer of employment (as long as it does so for all entering employees in the same job category), where an applicant is unable to provide requested medical information before an assignment begins, the staffing firm or client may revoke the offer.

Where possible, staffing firms should notify applicants ahead of time of medical information or examinations needed for certain types of work assignments. This enables applicants to obtain in advance the information needed for specific assignments that may need to be filled on short notice.

g. If a staffing firm or client requires a medical examination, an offer of employment may be revoked if the results of the examination are not received before the assignment begins. Because the ADA allows an employer to obtain medical information only after an offer of employment (as long as it does so for all entering employees in the same job category), where an applicant is unable to provide requested medical information before an assignment begins, the staffing firm or client may revoke the offer.

Where possible, staffing firms should notify applicants ahead of time of medical information or examinations needed for certain types of work assignments. This enables applicants to

obtain in advance the information needed for specific assignments that may need to be filled on short notice.

3. Disability-Related Inquiries and Medical Examinations of Employees

a. A staffing firm or client may ask disability-related questions or require a medical examination of a staffing firm worker once s/he is employed (i.e., during the work assignment), if the questions or examinations are job-related and consistent with business necessity.

b. A disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that:

(1) an employee's ability to perform essential job functions will be impaired by a medical condition; or

(2) an employee will pose a direct threat due to a medical condition."

c. Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious, as well as certain types of periodic medical examinations and monitoring, also may be job-related and consistent with business necessity.

d. Additionally, such questions or examinations of staffing firm workers while they are on a work assignment are permitted if they are required by another Federal law or regulation.

e. The questions or examinations must not exceed the scope of the specific medical condition and its effect on the staffing firm worker's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat. Thus, for example, if a staffing firm worker asks for a reasonable accommodation, and the disability and/or the need for accommodation is not obvious, the staffing firm or its client may ask the worker for reasonable documentation of his/her disability and functional limitations.

D. Reasonable Accommodation and Undue Hardship

1. Reasonable Accommodation During the Application Process:

a. Typically, only the staffing firm is an applicant's prospective employer during the application process because it has not yet identified the client for which the applicant will work. In such cases, only the staffing firm is obligated to provide a reasonable accommodation for the application process.

b. Here a client sends an applicant to apply for work with it through a staffing firm, the client will usually qualify as a prospective employer and, as such, will be obligated along with the staffing firm to provide reasonable accommodation for the application process.

c. While a client is generally not required to provide reasonable accommodations for the application process, a client that qualifies as a joint employer of staffing firm workers may still violate the ADA if it continues to obtain workers through a staffing firm although it knows or has reason to know that the firm does not provide reasonable accommodation for the application process. This is because a client that qualifies as a joint employer of staffing firm workers may be liable for a staffing firm's

discrimination if the client knows or has reason to know of the discrimination and fails to take corrective action within its control.

2. Reasonable Accommodation on the Job

a. Where a staffing firm and its client are joint employers of a staffing firm worker with a disability, each entity qualifies as an employer of the staffing firm worker, and each is obligated to provide a reasonable accommodation needed on the job, absent undue hardship, if it has notice of the need for the accommodation.

b. If it is not clear what accommodation should be provided, both entities should engage in an informal interactive process with the worker to clarify what s/he needs and to identify the appropriate reasonable accommodation.

c. According to the EEOC, it may be mutually beneficial for the staffing firm and its clients to specify in their contracts with one another which entity will provide reasonable accommodations that are required on the job or how the costs of accommodations will be shared. In this way, the question of which entity will provide an accommodation can be anticipated and resolved before a request is actually received, thereby eliminating unnecessary delay in providing the accommodation.

d. A staffing firm and its clients may, through a contract, allocate responsibility for providing reasonable accommodations in any way they choose. Any contractual arrangement between a staffing firm and a client, however, does not alter their obligations under the ADA.

3. Undue Hardship

a. A staffing firm or its client claim can claim undue hardship if a reasonable accommodation cannot be provided quickly enough to enable a staffing firm worker to begin, or to complete, a temporary work assignment in a timely manner. Some temporary jobs become available on short notice and last for only a brief period of time, during which certain tasks must be completed. In such cases, a staffing firm or client can establish undue hardship by showing that the work assignment had to be filled on short notice and that the accommodation could not be provided quickly enough to enable the staffing firm worker to timely begin or complete a temporary work assignment.

b. The fact that a staffing firm and its client have a very short period of time within which to provide an accommodation will not alone constitute undue hardship. For example, it is often possible to quickly provide qualified sign language interpreters for people who are deaf. Resources are also available to provide readers for people who are blind on short notice. Staffing firms and their clients should anticipate these types of requests for reasonable accommodations and plan for how to provide them expeditiously when a request is made.

Examples:

(1) Jane Doe applies with All-temps for craft work. Doe wears a prosthesis in place of her missing left hand and is substantially limited in her ability to perform manual tasks. In mid-October, All-temps offers Doe a temporary assignment, to begin the next day, as a wood cutter with Masters, a manufacturer of small wooden toys. The assignment is to last for two weeks, during which time Masters needs to complete production of a specified number of toys in anticipation of holiday sales that will begin in November. Doe tells All-temps that she can perform the job with a reasonable accommodation -- an inexpensive

adaptive device that she has used to perform similar work for other employers. Because neither All-temps nor Masters has the device, it must be ordered, and it will take about a week to receive. The accommodation results in an undue hardship for both All-temps and Masters.

(2) Same facts as above, except that the temporary work assignment does not begin for three weeks. Because there is adequate time for All-temps and Masters to provide the requested reasonable accommodation, neither can show undue hardship.

c. Assessing cost-related undue hardship

(1) Where a staffing firm and its client are both obligated to provide a reasonable accommodation for a staffing firm worker with a disability, assessing cost-related undue hardship should be based on the following principles:

(a) Where a reasonable accommodation would involve significant expense for both the staffing firm and the client, even if their resources were combined, both can show undue hardship.

(b) Where the resources of the staffing firm and the client together are sufficient to provide an accommodation without undue hardship, either entity may still show undue hardship if it can demonstrate that:

i) its resources alone are insufficient to provide the reasonable accommodation without undue hardship; and

ii) it made good faith, but unsuccessful, efforts to obtain contribution from the other entity.

(c) Where a reasonable accommodation would have resulted in significant expense for a staffing firm, and it has made good faith, but unsuccessful, efforts to obtain a contribution to the cost from the client, it has an undue hardship defense.

i) However, it should offer the worker the next available assignment for which s/he is qualified; and

ii) to avoid future liability for participating in the discriminatory conduct of the client, the staffing firm should inform the client of its obligation to provide reasonable accommodation and it should not assign other workers to that work site until the client agrees to abide by its ADA obligation to provide reasonable accommodation.

(d) Where a reasonable accommodation would have resulted in significant expense for a client and it has made good faith, but unsuccessful, efforts to obtain a contribution to the cost from the staffing firm, the client has an undue hardship defense.

i) To avoid future liability for participating in the discriminatory conduct of the staffing firm, the client should inform the staffing firm of its

obligation to provide reasonable accommodation and it should not obtain other workers through the staffing firm until the firm agrees to abide by its ADA obligation to provide reasonable accommodation.

(e) Where an entity's own resources are sufficient to provide an accommodation without undue hardship, it must do so, even if the other entity refuses to contribute to the cost of the accommodation.

(f) A staffing firm or client that refuses to contribute to the cost of a reasonable accommodation may be liable for a failure to provide a reasonable accommodation, even if the other entity provides it.

d. Where a staffing firm and its client are joint employers of a staffing firm worker with a disability, one entity may claim undue hardship where providing the accommodation is solely within the other's control if it can demonstrate that it has made good faith, but unsuccessful, efforts to obtain the other's cooperation in providing the reasonable accommodation.

(1) A *staffing firm* that asserts undue hardship under these circumstances should offer the worker the next available work assignment for which s/he is qualified, should inform the client of its commitment to provide reasonable accommodation, and should not assign other workers to that work site until the client agrees to abide by its ADA obligation to provide reasonable accommodation.

(2) A *client* that asserts undue hardship under these circumstances should inform the staffing firm of its commitment to provide reasonable accommodation, and it should not obtain other workers through the staffing firm until the staffing firm agrees to abide by its ADA obligation to provide reasonable accommodation.

E. Qualification Standards, Employment Tests, and Other Selection Criteria

1. Where the staffing firm and client are joint employers of staffing firm workers, the following principles apply to the use of qualification standards (including the use of the results of medical examinations):

a. A *staffing firm* will be liable for violating the ADA where:

(1) it applies a qualification standard, either directly or at its client's direction, that screens out an individual on the basis of disability and is not job-related and consistent with business necessity; or

(2) it knows or has reason to know that a client is applying a qualification standard that is not job-related and consistent with business necessity to screen out a staffing firm worker on the basis of disability and fails to take corrective action within its control.

b. A *client* will be liable for violating the ADA where:

(1) it applies a qualification standard, either directly or through a staffing firm, that screens out an individual on the basis of disability and is not job-related and consistent with business necessity; or

(2) it knows or has reason to know that a staffing firm is applying a qualification standard that is not job-related and consistent with business necessity to screen out a staffing firm worker on the basis of disability and fails to take corrective action within its control.

c. If the qualification standard is job-related and consistent with business necessity, the staffing firm and client must consider whether there is a reasonable accommodation that will enable a staffing firm worker with a disability to meet the standard.

2. ADA application to the administration and use of pre-employment tests in contingent work arrangements:

a. Many staffing firms administer their own pre-employment tests to screen applicants or administer tests at the direction of a client. Under the ADA, a covered entity must provide reasonable accommodations to an individual with a disability to ensure that a test accurately measures what it purports to measure, and not the particular skills (e.g., sensory, manual, or speaking skills) that are affected by the disability, unless these are the skills the test is actually intended to measure.

Moreover, where a test does measure the skills affected by an applicant's disability, a covered entity may not use the test results to exclude the individual, unless it can show that the skill is necessary to perform an essential function and that there is either no reasonable accommodation available to enable the individual to perform the function, or any necessary accommodation would result in undue hardship. In other words, use of the test results must be job-related and consistent with business necessity.

b. In the context of contingent work arrangements, the following principles apply where the staffing firm and client qualify as joint employers of staffing firm workers with disabilities:

(1) A *staffing firm* will be liable under the ADA if it:

(a) fails to provide a necessary reasonable accommodation, absent undue hardship, in connection with a pre-employment test that it administers to an individual with a disability either directly or on a client's behalf;

(b) uses the results of a test that it administers directly or on a client's behalf to exclude an individual with a disability, where the use of such results is not job-related and consistent with business necessity; or

(c) knows or has reason to know that a client is administering or using pre-employment tests in a manner that discriminates against staffing firm workers with disabilities on the basis of disability and fails to take corrective action within its control.

(2) A *client* will be liable under the ADA if it:

(a) fails to provide a necessary reasonable accommodation, absent undue hardship, for an individual with a disability in connection with any test

administered by the client directly or by the staffing firm on the client's behalf;

(b) uses the results of any pre-employment test administered by it directly, or by the staffing firm on its behalf, to exclude an individual on the basis of disability, where the use of such results is not job-related and consistent with business necessity; or

(c) knows or has reason to know that a staffing firm is administering or using pre-employment tests in a manner that discriminates against staffing firm workers with disabilities on the basis of disability and fails to take corrective action within its control.

XIII. MISCONDUCT TERMINATIONS AND THE ADA

A. Employee May Be Terminated for Violations of Valid Work Rules That Are Consistently Enforced

Pernice v. City of Chicago, 237 F.3d 783 (7th Cir. 2001). Daniel Pernice's 20 year tenure with the City of Chicago's Department of Aviation came to an end with his termination in August 1998. Prior to his termination, Pernice suffered from an addiction to cocaine that had forced him into treatment on several occasions. The district court dismissed the complaint on the grounds that Pernice's complaint admitted that he was terminated because of his drug addiction, and Pernice appealed.

The court of appeals upheld the dismissal of the case. According to the court, an employee may be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred as a result of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse; indeed, the ADA contains a specific provision stating that employers may hold alcoholics and drug users to the same qualification standards for employment or job performance or behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee. Therefore, the court held, so long as the work rule in question is applied consistently, an addict may be legally terminated for violation of that rule even if the employee's actions were disability-based.

B. Deaf Employee Terminated for Misconduct, Not Disability; Employer Not Obligated To Provide Interpreter

Edwards v. Wal-Mart Stores, Inc., 88 F. Supp. 2d 613 (W.D. La. 2000). Edwards has been deaf and unable to speak since the age of four. He communicated by sign language, finger spelling, and written notes. In August 1992, he was hired by Wal-Mart as a merchandise stocker and performed his job adequately. He communicated by writing notes or with the assistance of a co-worker who knew some sign language. On June 17, 1996, a co-worker observed him removing a can of root beer from the company-owned inventory and drinking the contents. Edwards was terminated following an investigation. A co-worker who knew sign language participated at the termination meeting. Edwards sued, alleging violations of the ADA.

The court found that Edwards was unable to establish that he was subject to an adverse employment action because of his disability; the evidence showed that he was terminated for unauthorized removal of company property, a terminable offense under the company's policies. Additionally, the court found that Wal-Mart had offered a legitimate, nondiscriminatory reason for terminating his employment. Finally, the court rejected his argument that the company had failed to

reasonably accommodate him by failing to provide a certified interpreter at the termination meeting. The court noted that it was not the company's responsibility to provide an interpreter when the employee had not requested one. The court therefore granted Wal-Mart's motion for summary judgment.

C. Misconduct Resulting from Mental Retardation May Be Cause for Termination

Walsted v. Woodbury County, 113 F. Supp. 2d 1318 (N.D. Iowa 2000). Woodbury County hired Plaintiff Gloria Walsted in 1989 to work as a custodian in the county's Building Services Department. From the beginning of her employment, Walsted was assigned to custodial positions that included work with other custodians while engaging in general office cleaning chores. Walsted was never assigned to a position that would force her to read the labels of chemical containers in light of her first grade reading level and IQ of 73. Her mental retardation accounted for the problems that led to Walsted's termination.

In October 1995, Walsted removed a wallet from the purse of a coworker as a prank. Though she merely hid the wallet and did not remove any of its contents, she was arrested and convicted of theft. As a result of this conviction, Walsted's supervisor counseled her regarding the behavior that was expected in the workplace. In December 1997, the Woodbury County Sheriff's Office received a complaint from the County Treasurer regarding the theft of automobile registration validation stickers from the courthouse. After videotape surveillance was set up in the treasurer's office, it was discovered that Walsted had taken the stickers. When interrogated about the theft by sheriff's deputies, Walsted replied that when she was bored at work she would use the stickers as decorations on packages that she pretended to wrap. Again Walsted was convicted of theft. As a result of this second conviction, the county terminated Walsted for "stealing property within the Motor Vehicle Department which is also property of the State of Iowa."

Faced with the county's motion for summary judgment, the court found Walsted to be disabled within the meaning of the ADA. Nevertheless, the court concluded that just as misconduct caused by alcoholism may serve as a legitimate reason for termination, so too can misconduct caused by mental retardation. Under the ADA, the court observed, employers are not required to overlook infractions of the law. Therefore, an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees. Despite this, however the county never attempted to accommodate the employee's disability and never sought to engage in the interactive process to craft a reasonable accommodation. This behavior alone sufficed to raise a fact issue as to the possible discriminatory animus of the county. Accordingly, the court denied the county's motion for summary judgment.

XIV. HOSTILE WORK ENVIRONMENT CLAIM

A. Introduction

In addition to protecting disabled individuals from discrimination, the ADA also prohibits actionable harassment against disabled individuals in the workplace. Although Title I of the ADA does not specifically enumerate disability-related harassment as a form of prohibited discrimination, the general prohibition of employment discrimination is worded sufficiently enough to encompass such a claim. *See* ***Rodriguez v. Loctite Puerto Rico Inc.***, 967 F. Supp. 653, 663 (D.P.R. 1997) (holding that hostile work environment claims are actionable under the ADA, and that the analysis follows hostile work environment claims under Title VII); ***Fritz v. Mascotech Automotive Sys. Group Inc.***, 914 F. Supp. 1481, 1492-95 (E.D. Mich. 1996) (denying summary judgment in a hostile work environment claim where sufficient evidence established that defendant's conduct may have been related to plaintiff's diabetes); ***Haysman v. Food Lion, Inc.***, 893 F. Supp. 1092, 1106 (S.D. Ga. 1995) (holding that a harassment or

hostile work environment claim is actionable under the ADA); ***Mannell v. American Tobacco Co.***, 871 F. Supp. 854, 860 (E.D. Va. 1994) (holding that an employee must be a "qualified individual" in order to invoke the protection of the ADA against harassment because of disability). ***But see McConathy v. Dr. Pepper/Seven Up Corp.***, 131 F.3d 558 (5th Cir. 1998) (stating that the 5th Circuit neither "recognizes [n]or rejects an ADA cause of action based on hostile environment harassment"). The ADA includes a prohibition against disability discrimination on "other terms, conditions and privileges of employment." The Supreme Court in ***Patterson v. McLean Credit Union***, 491 U.S. 164 (1989), interpreted similar language in Title VII to support a claim of hostile work environment.

1. Cause of Action for Disability-Based Harassment Recognized for First Time By Fifth Circuit

Flowers v. Southern Regional Physician Serv., No. 99-31354 (5th Cir. Mar. 30, 2001). Sandra Flowers was employed by Southern Regional Physician Services for two years. After one and one-half years at Southern Regional, Flowers' immediate supervisor learned that Flowers was infected with the Human Immunodeficiency Virus. Flowers was terminated eight months later. In her suit, Flowers alleged that from the time her supervisor learned of her HIV status to the time of her termination she was subjected to harassing conduct because of her disability. Flowers contended that the harassment included the fact that her supervisor, who had previously been a close friend, would no longer go to lunch with her, began intercepting her calls, eavesdropped on her conversations, and hovered around her desk. In addition, the president of Southern Regional, who had been very cordial to Flowers in the past, refused to shake Flowers' hand and avoided Flowers' office to get to other parts of the hospital after the discovery of Flowers' HIV status. Also, prior to the discovery of her illness, Flowers had been required to submit to only one random drug test. However, following the discovery, she was subjected to four random drug tests in one week. Also, prior to the discovery, Flowers had received a score of 38 out of 40 on her evaluation. After the discovery, though, Flowers was lured to a conference room in which her supervisor and the company's human resources manager were waiting. Flowers was written up and placed on 90-days probation. Then, just days before her probation was to end, she was written up and placed on another 90-day probation. The president of the company was in attendance at the meeting at which Flowers was informed of the second 90-day probation. During the meeting, the president allegedly called Flowers a "bitch" and said that he was "tired of her crap." Flowers began carrying a tape recorder with her at all times at work. Finally, Flowers was fired. At her termination meeting, the president ordered Flowers to turn her tape- recorder off and, when she refused, the president walked around his desk and physically removed the recorder from her pocket. Flowers filed suit and a jury returned a verdict that Flowers' disability was not a motivating factor in Southern Regional's decision to terminate her employment. However, the jury did conclude that Flowers was subjected to disability-based harassment that created a hostile work environment. The jury awarded $350,000 in damages, which were reduced to $100,000 by the district court. The Fifth Circuit first concluded that a cause of action for disability harassment does exist. The Court added that to succeed on a claim of disability-based harassment, the plaintiff must prove: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action. Applying these elements to the record developed in this case, the Court concluded that the evidence was sufficient to support the jury's verdict on Flowers' harassment claim.

2. Fourth Circuit Affirms Jury Verdict for Plaintiff Based on Hostile Work Environment

Fox v. General Motors, 11 A.D. Cas. (BNA) 1121 (4th Cir. Apr. 13, 2001): Plaintiff Robert Fox began working for GM in Delaware in 1968 and transferred to GM's newly opened West

Virginia plant the same year. In 1980, Fox took disability leave from GM due to a non work-related back injury and remained on leave until 1991. After his return to work in 1991, Fox experienced several reinjuries of his back and took several additional disability leaves of absence from GM. In August 1995, Fox again took disability leave, allegedly due to harassment at the plant, and he remained on disability leave until May 1998. In the meantime, Fox filed suit against GM in 1997, alleging discrimination and hostile work environment under the ADA. The district court jury returned a verdict for GM on the discrimination claim but found for Fox on the harassment claim and awarded him over $200,000 in damages. The Fourth Circuit affirmed the jury's verdict for Fox.

In his suit, Fox alleged that during his last working period, following his return from disability leave in October 1994 until his subsequent disability leave (resulting from workplace harassment) beginning in August 1995, he suffered a hostile work environment due to the actions of supervisors and coworkers. Testimony from Fox and other employees that Fox was forced to perform tasks that aggravated his back or was assigned work he was unable to do because of his limitations; that during a meeting, company officials made fun of disabled workers; that one supervisor provided Fox with a light duty work table that was located in a hazardous area and which was too small, causing him to reinjure his back; that one supervisor refused to allow Fox to take the medical examination for a truck driver position. Fox and others additionally testified that there was constant verbal harassment aimed at disabled workers, that other employees were instructed not to talk to disabled workers, that other employees refused to bring disabled workers materials they needed to perform their work, that supervisors directed profanity and insults at disabled workers, that disabled workers were supervised more closely and were segregated from other employees. Fox also presented evidence that he could have, and would have, continued to work at the GM plant but for the hostile environment to which he was subjected. The court held that, based on this testimony, Fox had presented ample evidence of "severe and pervasive workplace harassment."

B. Company Liable for Supervisor Teasing of Partially Deaf Employee

Thomlinson v. Sharp Elec. Corp., No 99-CIV-9539, 2000 U.S. Dist. LEXIS 18979 (S.D.N.Y. Dec. 22, 2000). Sharp employed Lynn Thomlinson from April 1997 until her termination in June 1999. During this time, according to Thomlinson, she was subjected to various forms of discrimination and harassment by her supervisor because one was deaf in one ear. This harassment included making jokes about Thomlinson's hearing, talking or screaming at Thomlinson while she was on the phone knowing that she could not hear him, and approaching her from behind to see how long it would take her to notice his presence. Based on these and other actions, Thomlinson alleged hostile work environment in violation of the ADA.

The court assumed, for the purposes of this case, that a claim for hostile work environment on the basis of disability to be actionable under the Act. Nevertheless, as the court found, an employer may escape liability for hostile work environment created by a supervisor if it can show that the employer exercised reasonable care to prevent and correct the harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Because there was evidence that Sharp did not take seriously Thomlinson's allegations of disability harassment, the court refused to grant summary judgment for the employer.

C. Employee Need Not Be Disabled To State Claim For Retaliation

Rhoads v. Federal Deposit Ins. Corp., 257 F.3d 373 (4th Cir. 2001). Lori Rhoads was hired as a financial analyst in September 1987 by Standard Federal Savings Bank. Rhoads suffered from asthma and related migraine headachesCconditions exacerbated by exposure to cigarette smoke. After

starting work at SFSB, Rhoads began feeling the negative effects from breathing co-workers' secondhand smoke. Eventually, in May 1993, Rhoads' supervisor arranged for her to work at home to avoid exposure to secondhand smoke. In June 1993, SFSB adopted a smoke-free workplace rule, to take effect on September 1 of that year. In telephone conversations and letters, bank officials and Rhoads debated whether she would come in to work, continue to work at home, or submit the necessary medical certification for disability leave. Rhoads was threatened with disciplinary action if she did not report to work. When Rhoads did not do so, she received a "final warning" letter, advising her that she had been placed on probation due to her "refusal to report to work the past eight business days," and that her employment would be terminated if she failed to report on September 14. A termination letter from Jones was hand-delivered to Rhoads on September 15, informing her that she had been fired for refusing to return to work for ten consecutive days "without supervisory approval and in direct defiance of repeated instructions." Rhoads filed suit and the employer was granted summary judgment.

Rhoads maintained on appeal that when she suffered the symptoms of asthma and migraine headaches, she was, at times, unable to work, leave her home, care for herself, or perform tasks requiring concentration. The Fourth Circuit agreed with the district court that Rhoads failed to make a sufficient showing that she was substantially limited in her ability to work, because she had established only that she was unable to function in one particular smoke-infested office. However, the Fourth Circuit reversed summary judgment on Rhoads' ADA retaliation claim. The court noted that Rhoads was not required to demonstrate she was disabled to recover in an ADA retaliation claim. Here, the dispute culminating in termination came on the heels of Rhoads' consultation with an attorney and threats of legal action against the bank, in addition to her numerous requests over the years for accommodation of her health conditions. The court concluded that this direct evidence of a stated purpose to discriminate (a purported threat to Rhoads regarding her consultation with a lawyer) coupled with the related indirect evidence (the timing of her attorney's subsequent letters in relation to the bank's decision to fire her, and Jones's involvement in that decision), created a genuine issue of material fact with regard to Rhoads's retaliation claim.

XV. MEDICAL AND FITNESS-FOR-DUTY EXAMS

A. Employer's "100% Healed Rule" May Violate ADA

Henderson v. Ardco Inc., 11 A.D. Cas. (BNA) 1333 (6th Cir. Apr. 4, 2001): Plaintiff Dana Henderson filed suit under the ADA following Ardco's refusal to reinstate her until she was "100% healed." Henderson began working for Ardco, a door manufacturing company, in 1985. In July of 1994, she injured her back and was forced to leave her welding job at Ardco to recuperate. In February 1995, when she was released to return to work with stooping, bending and lifting restrictions, she was told by the plant manager that "you have to be 100 percent to work here." The 100% rule appeared to be well known and consistently applied at the plant. Henderson continued to contact Ardco, requesting any work consistent with her restrictions, and was rebuffed. Although was eventually rehired by Ardco in June 1998, she sued Ardco under the Kentucky statute prohibiting disability discrimination. The court noted that it would interpret the Kentucky protections consonant with the ADA.

The Sixth Circuit reversed the district court's grant of summary judgment for Ardco, holding that Henderson produced sufficient evidence through job descriptions and witness testimony to show that she may have been qualified for her welding position as well as other jobs at Ardco, and that Ardco, in applying the 100% rule to exclude her from her from those jobs, may have treated her as disabled. Additionally, Henderson urged the court to find the 100% rule a per se violation of the ADA, emphasizing the fact that Ardco never gave her an individual assessment for her position as required by the ADA. However, the court declined to do so, noting that while a 100% rule is impermissible as to a disabled person, one must first be disabled. The court instead held that "[w]here the 100% rule is applied to mildly impaired persons to exclude them from a broad class of jobs, it may be treating them as disabled

even if they are not, thereby qualifying them for protection under the ADA and parallel statutes, and activating the individual assessment rule."

B. Appellate Court Rejects That Employer's Request for Medical Examination, Standing Alone, Is Sufficient To Prove That Employer Regarded Employee as Disabled

Tice v. Centre Area Transp. Auth., 11 A.D. Cas. (BNA) 1185 (3d Cir. Apr. 23, 2001): Plaintiff Randy Tice worked for the Centre Area Transportation Authority ("CATA") as a bus driver until February 1994, when he took medical leave for a back injury he sustained in October 1993. During the relevant periods of Tice's employment, CATA's collective bargaining agreement with Tice's union allowed employees with serious injuries or illnesses to take up to two consecutive years of unpaid leave (while continuing to accrue seniority) for any single medical condition. If the employee did not return to work after two years, the employee would be deemed to have "voluntarily resigned." However, if an employee were to return to work before the expiration of the two years and then leave again for the same illness or injury, the return would only interrupt the two-year time clock if that employee worked for a minimum of six weeks before going back on leave. CATA's policy was to require that after taking such leave, the employee only be permitted to return after submitting a "Return to Work Certificate" from a treating physician, affirming that the employee was physically fit to resume his or her duties.

Tice remained on leave for the rest of 1994 and all of 1995, except for brief periods of time when he returned to work, including a six-week period in September-October 1994, which reset the clock on the two-year time period. Tice informed CATA in April 1996 that he would be undergoing back surgery in July, but he subsequently canceled the back surgery and obtained a Return to Work Certificate from his physician stating that he could return to work if given an "air ride seat with lumbar support, power steering, lumbar work belt, 8 hr/day." Because the certification did not comment on the required safety of Tice's return, CATA requested further information from Tice's physician and after an exchange of letters, CATA informed Tice that he would be required to submit to an Independent Medical Examination before he could be reinstated. Tice submitted to the examination and was diagnosed with "lumbar spondylolysis with degenerate disc disease,"; the physician indicated, however, that with exercise and medication, Tice would be able to work, and he returned to his job on August 21, 1996. Tice worked for a month before he was injured in an automobile accident unrelated to his employment and again took medical leave. CATA informed him that his two year period of leave was about to expire and eventually informed him that it considered him to have resigned.

Tice filed several grievances over his termination and eventually filed suit under the ADA, alleging, among other things, that CATA regarded him as disabled when it required him to submit to the independent medical examination as a condition of his return to work in June 1996, and that CATA failed to properly safeguard his medical records. In affirming summary judgment granted to CATA by the district court, the appellate court rejected both of these claims. Citing to the EEOC's regulations which permit an employer to require an employee to submit to a medical examination which is job-related and consistent with business necessity, the court held that "a request for an IME that complies with the statutory restrictions will never, in the absence of other evidence, be sufficient to demonstrate that an employer 'regarded' the employee as substantially limited in a major life activity." Likewise, the court made short shrift of Tice's record keeping claims, noting that in order to maintain a suit against an employer on the ground of improper record keeping, an employee must be able to demonstrate an injury which entitles him to damages.

C. Employer May Have Regarded Chemist as Disabled By Requiring Fitness-for-Duty Exam

Campbell v. Prince George's County, 11 A.D. Cas. (BNA) 907 (D. Md. Jan. 4, 2001). Kellie Campbell was hired by Prince George's County in December 1995 to work at the County's Drug Analysis Laboratory as a Forensic Chemist. During her first year of employment, Campbell received an "outstanding" job performance evaluation from her immediate supervisor and a promotion to Forensic Chemist II. Following a long history of her complaining about alleged safety and health violations in the laboratory, the County terminated Campbell in March 1999.

Campbell brought suit, alleging discrimination in violation of the ADA and citing her history of liver disorder arising from a liver transplant as a disability. Specifically, Campbell alleged that she was treated differently that non-disabled employees when, in June of 1998, her supervisor required her to submit to a fitness for duty examination and in March 1999 when it terminated her employment. In denying the employer's motion for summary judgment, the court recognized that Campbell was not actually substantially limited in one or more major life activities. Nevertheless, the employer's actions in requiring a fitness-for-duty examination provided a triable issue of fact as to whether the County regarded Campbell to be disabled. The action of requiring a fitness for duty examination therefore precluded summary judgment in favor of the employer.

D. Employer May Require Medical Examination Before Approving Reasonable Accommodation

Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000). Kennedy was a journeyman in the employer's bindery. For several years, he and several other employees worked through their lunch periods in order to leave work early. After a change in supervisors, all employees were told they had to take their lunch period and leave at their scheduled times. All employees but Kennedy complied. He instead brought in a doctor's note stating that his condition, a foot injury, would benefit by not stopping for lunch. The employer complied for fifteen months and then requested a current medical evaluation from Kennedy. After repeated requests, oral warnings and written warnings that current medical documentation was required, the employer scheduled him for a medical examination on December 2, 1996. Kennedy did not show up for the examination. The employer rescheduled the medical examination and when Kennedy did not show up the second time, he was terminated. Pursuant to a collective bargaining agreement, he filed for arbitration, and alleged wrongful termination and violations of the ADA. Kennedy also sued in district court. The arbitrator decided that it was proper for the employer to require a medical examination. The district court ruled that the claim was barred by the arbitrator's adjudication. Kennedy appealed.

The Sixth Circuit held that Kennedy did not waive his statutory rights. However, the court found that the employer was entitled to request a medical examination from Kennedy. The court noted that the ADA permits employers to make inquiries or require medical examinations necessary to determine the reasonable accommodation required by the employee. The court found that the employer made numerous attempts to acquire medical documentation from Kennedy and then made further attempts by scheduling the medical examination. The court therefore found that there were no ADA violations and affirmed summary judgment in favor of the employer.

E. Employer's Overbroad Medical Inquiry Was Not Job Related

Riechmann v. Cutler-Hammer, Inc., 95 F. Supp. 2d 1171 (D. Kan. 2000). Riechmann worked for fourteen years as an "inside" sales person, and an additional five years as an "outside" sales person selling electrical distribution products for residential, commercial and industrial use. On June 29, 1997, she suffered a severe stroke that left her partially paralyzed on her left side. In accordance with her physician's instructions, she returned to a part-time inside sales position in January 1998. She wanted to return to outside sales, and the employer requested that she undergo an independent medical examination

("IME") to determine her ability to do a full-time outside sales job. She performed her inside sales job until May 1998 when she went on short-term disability leave. She was awarded long-term disability benefits in December 1998. Riechmann sued, alleging that the employer made improper medical inquiries in violation of the ADA.

The court noted that the ADA prohibits an employer from making disability-related inquiries and from requiring medical examinations unless such examinations are shown to be consistent with business necessity and are job-related. The court found that the IME satisfied the business necessity requirement because the examination was conducted to determine whether or not Riechmann could return to the outside sales position. However, the inquires made were overbroad and not job-related. The court found that the inquiries relating to medications types, dosages, and frequency as well as whether the employee was receiving counseling were inappropriate. The court held that where specific questions are posed to a physician, even on a form for generalized use, the employer must bear the responsibility for posing them. The court therefore denied summary judgment for the employer on Riechmann's claim of unlawful disability-related inquiries.

F. Request To Have All Applicants Submit To a Physical Examination Does Not Imply That Employer Regarded Applicants as Disabled

EEOC v. Woodbridge Corp., 124 F. Supp. 2d 1132 (W.D. Mo. 2000). At all relevant times, Woodbridge utilized the medical services of an occupational health clinic to conduct post-hire physical examinations. All of the applicants represented by the Commission accepted positions as production workers at Woodbridge only to have those offers revoked because of abnormal physical examinations.

The court rejected the Commission's suit on the basis that the employer did not regard its applicants as disabled. According to the court, Woodbridge merely viewed the applicants as unable to perform a narrow range of jobs requiring repetitive motions. Furthermore, the evidence indicated that the employer considered the applicants capable of performing other positions at the plant and in the workforce generally. Consequently, the court held that Woodbridge did not regard its employees to be disabled and therefore they were not within the class of individuals protected by the ADA.

XVI. MENTAL AND EMOTIONAL DISABILITIES

Mental and emotional impairments may be considered disabilities under the ADA.[88] A mental impairment is defined by the ADA as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities." Mental and emotional impairments account for 13.7% percent of the charges filed with the EEOC between July 1992 and September 1998; this represents the second largest category of disability charges.[89]

The EEOC Manual states that personality traits "such as poor judgment, quick temper or irresponsible behavior are not themselves impairments."[90] However, behavior resulting from a mental impairment could be considered a disability.[91] Neither the ADA nor the implementing regulations specifically address whether "phobias" would be considered personality traits or impairments.

A. Mental or Emotional Condition Must Substantially Limit a Major Life Activity

Like physical disabilities, a plaintiff must show that the mental impairment substantially limits a major life activity. The employer must have knowledge of the actual condition alleged to be a disability and not just the manifested behaviors allegedly resulting from the condition.

1. Depression That Was Not Debilitating Not a Disability

Ogborn v. United Food & Commercial Workers, Local No. 881, No. 98 C 4623, 2000 U.S. Dist. LEXIS 14092 (N.D. Ill. Sept. 25, 2000). Jerry Ogborn worked as a business representative for the Union until his termination in January 1998. His primary duty was the representation of Union members in grievance proceedings. The Union repeatedly counseled Ogborn regarding his failure to file grievances on behalf of the Union members.

In August 1997, Ogborn's therapist diagnosed him with clinical depression. In order to treat this condition, the doctor prescribed antidepressants and sleeping pills. Moreover, Ogborn took a prolonged leave of absence to hasten his recovery. Prior to his return, however, the Union terminated Ogborn's employment. In light of this termination, Ogborn filed suit, alleging disability discrimination.

The court, however, found Ogborn not to be disabled within the meaning of the ADA. According to Ogborn, his depression substantially limited his major life activity of working. Nevertheless, the court recognized that in order for an impairment to substantially limit a major life activity, it must be of significant duration. By contrast, Ogborn's depression, by all accounts, would not impair his ability to work for more than two months. Because the impairment would not have a long-term debilitating effect, the court held that it did qualify as a disability under the ADA, and granted summary judgment in favor of the Union.

2. Benefit Analyst With History of Depression and Alcoholism Was Not Disabled

Schneiker v. Fortis Ins. Co., 200 F.3d 1055 (7th Cir. 2000). Schneiker was diagnosed with depression and was prescribed medication by a psychiatrist. At one point she was hospitalized in a psychiatric hospital. According to Schneiker, she was hospitalized for her depression on two more occasions in 1990. The third hospitalization identified alcohol as an additional problem. Schneiker's problems at Fortis began in 1993 when she began receiving poor evaluations and her depression began to affect her work. In September of 1993, Schneiker became emotionally overwrought at work and was sent home. A few days later, Schneiker began crying uncontrollably at a staff meeting. Her supervisor, Dana Sanders, told her she could leave the meeting. A Fortis employee asked Schneiker to submit to an alcohol test because a staff member had smelled alcohol on her breath. Later that same day Schneiker reluctantly took the test and the results were negative. The ordeal of taking the alcohol test, however, increased Schneiker's emotional trauma that day and she was admitted to the hospital because of her condition. Schneiker was eventually terminated and sued alleging violations of the Americans With Disabilities Act.

The court dismissed employee's claims and found that she had not demonstrated that her depression substantially limited her ability to work or any other major life activity. Instead, the court observed the record showed that employee's inability to work was due to her inability to work with her supervisor. Schneiker argued that her depression was triggered by stress, not by working under Sanders, and that her depression substantially limited her ability to work. The court found, however, that she had failed to produce any evidence that her inability to work in "stressful situations" precluded her from a class of jobs or a wide range of jobs. The court found that the record only showed that Schneiker could not work when supervised by Sanders. The court stated that standing alone, "a personality conflict between an employee and a supervisor - even when it triggers the employee's depression - is not enough to establish that the employee is disabled, so long as the employee could still perform the job under a different supervisor." The court concluded that there was no evidence that she was precluded from working at Fortis or from a host of other jobs as a result of her depression. The court affirmed summary judgment for the employer.

3. Plant Worker's Depression Was Not a Disability

Niese v. General Elec. Co., No. 99-1457-C, 2000 U.S. Dist. LEXIS 16099 (S.D. Ind. Oct. 26, 2000). Donna Niese worked as an hourly employee at General Electric's Bloomington, Indiana plant as a coordinator. In this position, she was responsible for ensuring that all individuals necessary for the startup for the assembly line had reported to work. On October 27, 1997, Niese requested an unpaid leave of absence, citing personal problems and childcare issues. GE denied this application to take unpaid leave. Because of this action Niese brought suit, alleging failure reasonably to accommodate her disability of depression.

Niese testified that her depression cause her pain in her arms and legs making it difficult to get out of bed at times and that she had difficulty completing daily tasks. Finding Niese not to be disabled, the court noted that such difficulty does not rise to the level of a substantial limitation on a major life activity. Moreover, in light of a medical release permitting Niese to return to full-time work, the court found her not to be substantially limited in the major life activity of working. Accordingly, the court held that Niese was not a qualified individual with a disability under the ADA.

4. Depression Did Not Substantially Limit Surgical Resident's Major Life Activities

Swanson v. University of Cincinnati, No. 99-3993, 2001 U.S. App. LEXIS 20629 (6th Cir. Sept. 20, 2001). After completing medical school at the University of Nevada, John Swanson was accepted as a general surgical resident at the University of Cincinnati in May 1995. In May 1996, Swanson's first six-month evaluation described Swanson's work as "below the level expected," and Swanson was placed on academic probation. Based on the recommendation of a physician, Swanson sought help from a psychiatrist. She diagnosed him as suffering from major depression. Swanson was experiencing poor concentration, an inability to speak, tearfulness, and feeling withdrawn and exhausted. He only slept four to five hours per night, but his sleep was not disturbed. From July to September, Swanson's surgery and trauma rotations yielded mediocre reviews. The Residency Review Committee terminated Swanson's residency. Swanson's union representative requested that he receive a medical leave of absence for an unspecified time due to his depression. This request was denied on the grounds that a surgical residency could not be interrupted and must be completed through consecutive years of training. Swanson filed a suit alleging that UC had terminated him on the basis of his disability, major depression, and denied his request for accommodation. The district court granted the university's motion for summary judgment. On appeal, Swanson argued that he was significantly restricted in his ability to sleep, concentrate, and communicate. The Sixth Circuit held that while Swanson was impaired in his sleep and communication by his depression, he was not substantially limited. His own statements and actions showed that when he was on Paxil and Prozac, the quality of his sleep improved, and he recovered his communication abilities. The court noted that while less than five hours sleep was not optimal, he was not significantly restricted in comparison to the average person in the general population. Taken as a whole, his medical training record showed that his depression impacted, but did not significantly restrict, the condition, manner, or duration of his ability to concentrate. Swanson also argued that he was substantially limited in his ability to work. The court noted that during his UC residency, Swanson performed well in some rotations but not so in others. The court concluded that Swanson demonstrated that he did not perform as expected in a single, particular job, but could perform in a class of medical jobs.

B. Individual Must Be Otherwise Qualified To Perform Job Duties

Individuals with mental impairments must be "otherwise qualified" for the job despite the disability. There may be no possible accommodation that can enable a person with a mental condition to perform his or her essential functions. The unpredictable nature of such disorders creates difficulties in establishing procedures and policies to assist the employee. Providing physical accommodations, which

may be appropriate with physical disabilities, may not be a viable solution to accommodating individuals with mental impairments.

C. Collective Bargaining Agreements

1. Employers Not Required To Violate Terms of Collective Bargaining Agreements To Accommodate Disabled Employees

Lockard v. General Motors Corp., No. 4:99CV0786, 2001 U.S. Dist. LEXIS 309 (N.D. Ohio Jan. 19, 2001). General Motors employed Sandra Lockard as an assembly line worker at its plant in Lordstown, Ohio. After suffering an on-the-job injury, Lockard was on worker's compensation leave for approximately eight years. Within two years of her 1990 return, she suffered another work related injury. At the end of her second leave, Lockard sought a position under the company's reasonable accommodation program adopted under the collective bargaining agreement. Under the program, a returning worker may only displace a less senior worker holding a position which matches the returning worker's medical restrictions, unless the union agreed to an exception. When it could not find a position for Lockard following her leave that fit within the parameters of the agreement, GM discharged her.

In rejecting Lockard's claims, the court evaluated in depth whether she was a qualified individual with a disability. Because of her limited seniority, the terms of GM's collective bargaining agreement prevented Lockard from applying for a number of positions. Of the positions that were available to an individual with her seniority, none fit her medical restrictions. Because the ADA does not require an employer to violate another employee's rights provided by a collective bargaining agreement, the court refused to order GM to place Lockard in a position for which her seniority did not otherwise qualify her. Therefore, the court granted summary judgment in favor of the employer.

2. Accommodation Requiring an Employer To Violate a Collective Bargaining Agreement Is Per Se Unreasonable

Willis v. Pacific Maritime Ass'n, 236 F.3d 1160 (9th Cir. 2001). David Willis and Paul Gomez both worked as longshore workers in the San Francisco Bay Area. They were both union members and were bound by the terms of a collective bargaining agreement. While Willis suffered various injuries to his back and neck, Gomez incurred a leg injury and suffered from cancer. Both men were released for light duty work. Under the collective bargaining agreement, however, no job was available for the men at their current seniority level. The men brought suit against the union, the association of employers, and their own individual employers. After the district court granted summary judgment for the union, Willis and Gomez appealed.

In affirming the district court's judgment, the court of appeals adopted the rule that a proposed accommodation is per se unreasonable where it requires an employer to violate the seniority provisions of a collective bargaining agreement. A plain reading of the ADA, asserted the court, supports the conclusion that an accommodation that would compel an employer to violate a CBA is inherently unreasonable. This per se rule, however, is only applicable where there is a direct conflict between the proposed accommodation and the collectively-bargained seniority rights of other employees. Moreover, employers and unions remain free to bargain for specific language that creates an exception to the seniority system to accommodate employees with disabilities.

XVII. MISCELLANEOUS

A. Plaintiff Who Signed Comprehensive Release of All Claims Against Employer Waived Right To Bring ADA Lawsuit

Bickings v. Bethlehem Lukens Plate, 82 F. Supp. 2d 402 (E.D. Pa. 2000). In 1996, plaintiff suffered a heart attack and took a leave of absence. While on leave, defendant eliminated plaintiff's position. Upon plaintiff's return, the defendant offered plaintiff a severance package that required him to sign a general release agreement and gave plaintiff the opportunity to apply for new positions. Plaintiff accepted the severance package. He signed the general release which stated that plaintiff waived "any and all claims . . . of any kind . . . known or unknown . . . without limitation . . . now . . . or . . . in the future." When plaintiff heard that the person selected for the machine shop planner position did not have supervisory experience, plaintiff sued, and alleged that defendant violated the ADA for failing to rehire him. Plaintiff alleged that the release (a) only barred claims that arose out of his actual employment and not his failure to rehire claim, and (b) did not bar his failure to rehire claim because it accrued after the execution of the release.

The court concluded that the parties intended to release all claims against the employer, including plaintiff's failure to rehire claim. The court held that the language of the release waived plaintiff's discrimination claim regardless of when his failure-to-rehire claim accrued. Accordingly, the court granted the defendant's motion for summary judgment.

B. Refusal To Hire Does Not Give Rise To Inference of Discrimination

Allen v. Interior Constr. Servs., Ltd., 214 F.3d 978 (8th Cir. 2000). Allen was a journeyman carpenter who worked with the company from December 1994 through November 1995 whenever carpentry work available. Following an back injury in November 1995, he contacted the company several times and requested work. However, the employer stated there was no carpentry work available each time he called. Allen sued, alleging the employer refused to hire him from December 1995 through July 1996 because he was disabled or was perceived as disabled. The district court entered judgment for the employer and Allen appealed.

The Eighth Circuit held that the Allen failed to establish that the employer's failure to employ him did not support an inference of intentional discrimination. The court noted that an inference of discrimination arises where there is some evidence of a casual connection between an employee's disability and the adverse employment action taken against the employee. Allen argued that the employer discriminated against him because the employer hired 23 carpenters from December 1995 through July 1996. The court noted that the employer had no affirmative duty to contact him whenever work was available. Also, the employer hired most of the carpenters during a time period when Allen did not call the employer. Furthermore, the court held that even if Allen had established a prima facie case of discrimination, the employee failed to establish that the employer's reason for not hiring him--lack of work--was a pretext for discrimination. The court therefore concluded that summary judgment was warranted for the employer, and affirmed the district court's ruling.

C. Temporal Proximity Between Diagnosis and Termination Does Not Alone Show Pretext

White v. Bank of Am. Corp., No. 3:99-CV-2329-G, 2000 U.S. Dist. LEXIS 16111 (N.D. Tex. Nov. 3, 2000). Gregory White worked for NationsBanc Mortgage from August 12, 1996 until February 1, 1999. Originally hired as an account executive, White was promoted to branch manager of the NationsBanc Mortgage office in Las Colinas, Texas. In November 1998, doctors diagnosed White with Hepatitis C, a potentially fatal blood-borne virus that attacks the liver. As a result of this illness,

White could not attempt to conceive a child with his wife due to the potential effects of his medication and the danger of infecting his spouse. Based on the grounds that White failed to follow his supervisor's hiring directives, NationsBanc terminated White's employment in early 1999.

The court held that Hepatitis C, as contracted by White, substantially limited the major life activity of procreation. Consequently, he was disabled within the meaning of the ADA. Moreover, as a qualified individual with a disability who was terminated from his employment, White successfully made a *prima facie* case of disability discrimination. The court failed to find any evidence, however, to suggest that the reasons stated by the employer for the action constituted a pretext for discrimination. To support his allegations of pretext, White alleged only a close temporal proximity between his diagnosis and his termination. The court found that this proximity, however, without more, does not suffice to show pretext. In addition, he put forth his own subjective conclusions that he was treated less favorably than other employees by his supervisors. Noting, however, that such subjective conclusions constitute no evidence of discrimination, the court entered summary judgment in favor of the Bank.

D. No Individual Liability Under ADA

Wolfington v. Detroit City Pub. Sch., No. 99-CV-75872-DT, 2000 U.S. Dist. LEXIS 19165 (E.D. Mich. Nov. 22, 2000). Dan Wolfington began his employment with the Detroit Board of Education as a teacher in September 1979. He received various promotions throughout his career, ultimately attaining the position of principal at the Dexter Careers Center. In February 1997, Wolfington requested an accommodation under the ADA. Pursuant to this request, the school reassigned Wolfington to the position of Program Associate I. Wolfington filed a charge of discrimination with the EEOC alleging that he had been denied a reasonable accommodation under the ADA. In his charge, and subsequent lawsuit, he named not only the school district, but also several individuals in their official capacity.

Granting the individual defendants' motion to dismiss, the court noted that the ADA only provides for recovery against an employer. The ADA's definition of employers, however, does not include supervisors. Accordingly, supervisors named in their individual capacity do not fall within the definition of employers adopted by the ADA. Consequently, Wolfington could not maintain an action against his individual supervisors under the ADA.

E. Where Employee Has Sworn In An Application For Disability Benefits That He is Unable To Work, He Must Sufficiently Explain How He Could Perform The Essential Functions Of A Job

Lane v. BFI Waste Sys. of North America, 257 F. 3d 766 (8th Cir. 2001). Michael Lane was a front-end loader for BFI when he sustained a back injury. He received medical treatment for the injury and continued to work. Approximately two years later, Lane re-injured his back while on the job and took three months of medical leave. Because of his injured back, Lane was no longer able to climb in and out of large garbage trucks. Consequently, Lane returned to BFI as a dispatcher. Under various temporary restrictions limiting his ability to lift, bend, and stand. These restrictions were later removed, but he was permanently restricted from lifting more than 50 pounds. Lane also worked on a computerized mapping and routing system referred to as "MARS." In August of 1996, Lane was involved in an accident in his personal vehicle. He broke his wrist and pelvis. In November of that year, his doctor released him to return to work. BFI informed Lane that MARS was no longer operational and conditionally offered him a position as route auditor. Route auditors were required to use the large garbage trucks. After examining Lane and reviewing the job description for route auditor, a physician determined that Lane was physically unable to perform the position's essential duties, such as frequent "stooping, kneeling, crouching, crawling, and entering and exiting large refuse vehicles." The doctor also determined that Lane would have difficulty standing, walking, reaching with his hands, and climbing on

an occasional basis. Subsequently, Lane requested that he be able to return to his position as a dispatcher; however, BFI informed him that there were no dispatcher positions available in his district. Lane applied for, and eventually received, long term disability benefits from the Social Security Administration (SSA). In his SSA application he stated, and the SSA found, that he was unable to engage in any substantial work. BFI terminated Lane's employment and he filed suit. The district court granted BFI's motion for summary judgment.

On appeal, Lane asserted he presented sufficient evidence that he was a qualified individual for the position of dispatcher because he had previously performed the job, and the only accommodation he needed to perform the essential functions of the job was a comfortable chair. However, BFI asserted that Lane was not a qualified individual because he failed to address the discrepancy between his assertion that he was able to perform the essential functions of the dispatcher position and his claim of disability in his social-security application. The Eighth Circuit agreed with BFI. The court noted that statements to the SSA to secure disability benefits do not automatically preclude a successful suit under the ADA, nor was there "a special legal presumption" against such a suit brought by a person who had successfully applied for social-security disability benefits. However, where an employee has sworn in an application for disability benefits that he is unable to work at any job, he must proffer a sufficient explanation "to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of [his] job.'" The Eighth Circuit held that Lane proffered no evidence to harmonize his inconsistent statements. The only explanation advanced by Lane was that he filed for SSA benefits because it was required by his insurance company. This statement, the court noted, explained only his motivation for applying for SSA benefits; it did not explain or even address how, in light of his assertions of disability, he was, in fact, qualified to perform the essential functions of the dispatcher position.

F. State Officials Can Be Sued In Their Official Capacity For Injunctive Relief

Gibson v. Arkansas Dept. of Corrections, No. 01-1038, 2001 U.S. App. LEXIS 20315 (8th Cir. Sept. 12, 2001). In this appeal, the Eighth Circuit determined that state officials can be sued in their official capacity for injunctive relief under Title I of the Americans with Disabilities Act. The court noted that in *Ex parte Young*, 209 U.S. 123, 155-56, (1908), the Supreme Court held that when a state official acts in violation of the Constitution or federal law, he is acting ultra vires and is no longer entitled to the State's immunity from suit. The ***Young*** doctrine permits only prospective injunctive relief; no money damages are available. The court stated that when the relief sought is prospective injunctive relief, the request "is ordinarily sufficient to invoke the ***Young*** fiction." Thus, private individuals can sue state officials for injunctive relief under the ADA by using ***Young***.

G. Plaintiff Must Prove Malicious or Reckless Indifference To Obtain Punitive Damages

Webner v. Titan Distrib., Inc., No. 00-2941, U.S. App. LEXIS 21575 (8th Cir. Oct. 9, 2001). Randall Webner began his association with Titan in 1991 while he was employed by Titan's predecessor, Neiman's. Neiman's was a family-owned business specializing in brake and actuator assemblies that were mounted onto trailers. In 1994, Webner suffered a work-related herniated disk in his back while unloading tires from his truck. Webner had surgery and was off work recovering for six months. Three months after returning to work he suffered another work-related back injury while driving a truck with a broken seat. Doctors diagnosed Webner with a new herniated disk in his back. Webner underwent a second back surgery in March 1996 where doctors inserted a metal plate into his back. After extensive rehabilitation, Webner was able to return to work full time at Titan in January 1997--a year and a half after his second injury. Because Webner's former truck driving position had been eliminated when Titan purchased the Neiman's facility, Titan assigned Webner to the assembly line. Webner's physician imposed several work restrictions upon his return, including a lifting restriction and a restriction on

twisting and bending. While Webner was recovering from his second surgery, he filed a workers' compensation claim. In connection with the investigation of this claim, Webner's attorney requested permission to videotape Webner's work station at Titan. Titan refused this request, stating that videotaping its facilities was against company policy. Webner filed a motion on March 26, 1997, to compel Titan to allow the videotaping. On March 31, 1997, Webner's supervisor at Titan informed him that he was being terminated "due to [his] disability." Webner filed suit and, following a four-day trial, the jury awarded Webner $13,771 for lost wages and $25,000 for emotional distress damages. The jury also awarded Webner a total of $200,000 in punitive damages.

On appeal, Titan first challenged the finding that Webner was discriminated against, contending that Webner failed to establish a prima facie case under the ADA. The Eighth Circuit held that Webner presented evidence that allowed a rational jury to determine that his disability substantially limited one or more of his major life activities. Sitting, standing, lifting, and reaching are considered major life activities. Webner testified at trial that his back injury limited his ability to walk, to stand for long periods of time, to twist, and to bend at the waist without pain, which ultimately affected his ability to work. The jury also heard testimony that Webner had an impairment rating of 18% of the body as a whole after his three back surgeries, was only authorized to return to work incrementally subject to bending and lifting restrictions, and required physical therapy. Titan further contended that there was insufficient evidence to support the punitive damages award. The Eighth Circuit agreed, noting there was no evidence of malice and insufficient evidence of reckless indifference on Titan's part. Titan's stated reasons for terminating Webner - -that his back injury precluded him from performing all but light-duty tasks, Titan was fearful that Webner would reinjure his back, and Titan did not have a job suited to his disability - - did not rise to the level of maliciousness required to sustain the jury's award of punitive damages.

H. Discrimination Prohibited In Job Training

Hoffman v.Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001). Shirley Hoffman began worked for Caterpillar's Optical Services Department Hoffman's primary job responsibility was indexing - entering data relating to a scanned image into a computer. Hoffman was born without a left arm below the elbow. She therefore needed several accommodations to perform her job, including a typing stand, poster putty to raise the function key on her computer, and a compound to improve finger grip. Although Hoffman already performed all of the required functions of her job, she expressed a desire to be trained on the high-speed scanner, a production machine that scanned forty to fifty pages per minute. Caterpillar contended that Hoffman's lack of training on the high-speed scanner did not affect her compensation, benefits, work hours, job title, or ability to advance within the OSD. Hoffman maintained that she should be trained, regardless of whether her ability to advance was affected, because every other employee who expressed an interest in operating the high-speed scanner received the necessary training to do so. Hoffman's supervisor, admitted that he denied Hoffman training on the high-speed scanner because she only had one hand. He claimed that her disability would prevent her from being able to properly run the high-speed scanner because two hands were needed to clear paper jams and to straighten documents as they exit the machine.

The Seventh Circuit noted that Caterpillar was not obligated to train Hoffman on the high-speed scanner if she was not capable of running it. However, the court found that there was an issue of fact as to whether Hoffman would be able to operate the high-speed scanner. The court stated, "A determination that two-handed people use both of their hands to operate the high-speed scanner, or even a determination that most one-handed people would be unable to run it, should not be the end of an employer's inquiry. It seems doubtful that [the supervisor] made an individualized determination as to whether Hoffman could operate the high-speed scanner because he never gave her a chance to try it. Caterpillar claims that the primary reason that Hoffman lacks the capability to run the high-speed scanner

is that she would be unable to effectively clear the frequent paper jams that occur. There is evidence in the record, however, that Hoffman clears paper jams from the copy machine without assistance, and Caterpillar presents no evidence to suggest that clearing paper jams from the high-speed scanner is somehow different. Hoffman's supervisor admits that he refused Hoffman's requests for high-speed scanner training because of her disability. Therefore, because the ADA specifically prohibits discrimination in the area of job training and Hoffman has direct evidence of discrimination, we find that the district court erred in granting summary judgment for the defendant on this issue."

The court then turned to Hoffman's failure to accommodate claim and the question of whether Caterpillar must accommodate Hoffman in order to allow her to operate the high-speed scanner if she was unable to do so without accommodation. Operating the high-speed scanner was non-essential function of Hoffman's position. The court noted that Caterpillar had chosen to accommodate Hoffman's disability by letting other employees run the high-speed scanner, and, if Caterpillar turned out to be correct that Hoffman was unable to run the high-speed scanner without assistance, the court would not disturb Caterpillar's chosen method of accommodation. The court added that nothing in the ADA requires an employer to accommodate an employee so that she may perform any nonessential function that she chooses.

I. Unexplained Assertions In Social Security Disability Application Negate Element of ADA Claim That Plaintiff Could Perform Essential Job Functions

Lee v. City of Salem, 259 F.3d 667 (7th Cir. 2001). Jimmy Dale Lee began work at Salem's Crown Hill Cemetery in 1978 and became sexton in 1992. He and the other cemetery workers prepared grave sites, tended the lawn with mowers and weed-eaters, and on occasion moved headstones. In April 1994, Lee fell from a stand of bleachers while attending a race at a local speedway. He suffered several herniated disks as a result and underwent surgery to repair the damage. In March of 1995, Lee applied for Social Security Disability Insurance ("SSDI") benefits, indicating that he was unable to work. Lee's physician determined that he would never be able to again perform heavy physical labor and prepared a disability form making his light-duty restrictions permanent. The city decided to discharge Lee and instructed the mayor to explore the possibility of offering Lee employment elsewhere within the city's workforce. Nothing came of this proposal. Lee was discharged from his job. After losing his job, Lee sought disability benefits for the second time. Lee requested a hearing before an ALJ, stating in part that "I feel I am disabled and unable to work due to the severity of my back problem." The ALJ held in Lee's favor and awarded him benefits. Lee then sued the City of Salem, alleging he was discriminated against because of a disability. At trial, Defense counsel asked Lee whether it was true in mid-1997, when he asked for a hearing on his claim, that he was unable to work. Lee answered as follows:

> I did my work, I felt the reason I made those statements was that everybody kept hammering me and saying you were disabled, and whatever, and then these people, that is what they do is write it up for - they write out the request for you. And I feel like I had no other just thing to do but just agree, you know, file for disability.

The Seventh Circuit noted that when Lee sought disability benefits following his discharge, he represented to the Social Security Administration that he was no longer able to work as a sexton. However, at the trial of this ADA suit, he testified that he could work as a sexton. Thus, Lee was required to explain the discrepancy.

The Seventh Circuit recognized that a plaintiff may not, simply by disavowing a prior claim of total disability, perform an about-face and assert that he is a "qualified individual" who is capable of working. Rather, the plaintiff must proceed from the premise that his previous assertion of an inability to

work was true, or that he in good faith believed it to be true, and he must demonstrate that the assertion was nonetheless consistent with his ability to perform the essential functions of his job. Here, however, rather than reconciling his claim for disability benefits with the criteria of the ADA, Lee attempted to abandon altogether the assertions that he made to the Social Security Administration. Lee did not attempt to quality his prior statements at all. Instead, he accepted the natural import of those statements and indicated that he had since had a change of heart. As a result, Lee failed to establish his ability to perform the essential functions of his former position at the cemetery. Left unexplained, the sworn assertions in his SSDI application to the effect that he was unable to return to that job negated this element of his ADA claim.

ENDNOTES

1. 29 C.F.R. §§ 1630.2(h)(1) & (2).

2. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(h) App.

3. *Id.*

4. *Id.*

5. *Id.*; *see also* ***Greenberg v. New York State Dep't of Correctional Serv.***, 919 F. Supp. 637, (E.D.N.Y. 1996) (employer's perception that an applicant could not make safety decisions in emergency situations, perform well under stress, and identify potential disruptive situations was "tantamount" to finding that he had "poor judgment," which is a "personality character trait[]," not covered under the ADA).

6. *See* EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p.4; ***Duda v. Board of Educ.***, 133 F.3d 1054 (7th Cir. 1998) (mere temperament and irritability are not covered under the ADA).

7. EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act (hereinafter referred to as "EEOC TAM") Ch. II § 2.1(a)(iii) (1992); ADA Man. (BNA) 90:0509-10 (1992).

8. EEOC Comp. Man. § 902, Introduction, 902:iii; *see* ***Sanders v. Arneson Prod. Inc.***, 5 A.D. Cas. (BNA) 1292 (9th Cir. 1996) (temporary psychological impairment cannot be the basis of a sustainable claim under the ADA); ***Skinner v. Atlantic Marine, Inc.***, No. 96-0622, 1997 U.S. Dist. LEXIS 9729 (S.D. Ala. June 23, 1997) (employee who returned to work two months after undergoing coronary bypass surgery was not disabled under the ADA because his history of heart disease was a temporary impairment).

9. 29 U.S.C. § 812.

10. 29 C.F.R. § 1630.3(a)(2).

11. The Controlled Substances Act, 21 U.S.C. § 843(a)(3), states that "it shall be unlawful for any person knowingly or intentionally. . .to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."

12. 42 U.S.C. § 12210; EEOC Interpretive Guidance 29 C.F.R. § 1630.3 App.

13. EEOC TAM Ch. VIII § 8.5, ADA Man. (BNA) 90:0569; *see also* ***Shafer v. Preston Mem'l Hosp.***, 107 F.3d 274 (4th Cir. 1997) (finding that the "safe harbor" provision of ADA, which provides statutory protection to recovering addicts, *excludes* employees caught on the spot using illegal drugs who immediately enroll in drug rehabilitation).

14. 42 U.S.C. § 12211(a).

15. 42 U.S.C. §§ 12208, 12211.

16. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(h) App.

17. *See* EEOC Compliance Manual § 902.8 at p. 45.

18. EEOC TAM Ch. II § 2.2(a)(i), ADA Man. (BNA) 90:0508-9.

19. ***Id.***

20. 42 U.S.C. § 12211.

21. 135 Cong. Rec. S10,785 (daily ed. Sept. 7, 1989) (remarks of Senator Armstrong).

22. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(i) App.

23. ***Id.***

24. ***Id.***

25. EEOC Comp. Man. (BNA) § 902, Introduction, 902:iii.

26. EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 4.

27. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(j) App.

28. ***Id.***

29. ***Id.***

30. ***Id.***

31. ***Id.***

32. ***Id.***; *see* ***Rogers v. Int'l Marine Terminals, Inc.***, 87 F.3d 755 (5th Cir. 1996); ***Bolton v. Scrivner, Inc.***, 836 F. Supp. 783 (W.D. Okla. 1993), *aff'd*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); ***Welsh v. City of Tulsa***, 977 F.2d 1415 (10th Cir. 1992); ***Ricks v. Xerox Corp.***, 877 F. Supp. 1468 (D. Kan. 1995), *aff'd mem.*, 96 F.3d 1453 (10th Cir. 1996).

33. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(j) App.

34. 42 U.S.C. § 12102(2)(B).

35. *See* EEOC Amicus Curiae Brief in ***Derbis v. U.S. Shoe Corp.***, (brief filed with Fourth Circuit, 1/24/95) at 8, ft.8 (court decision reported at 3 A.D. Cases (BNA) 1029, 1030 (D. Md. 1994), *aff'd in part, remanded in part*, 67 F.3d 294 (4th Cir. 1995) (unpublished opinion). *But see* EEOC Amicus Curiae Brief in ***Deane v. Pocono Med. Ctr.***, No. 96-7174, 1997 WL 500144 (3rd Cir. Aug. 25, 1997), *reh'g granted, vacated* (brief filed with Third Circuit, 9/22/97) at 6 (although the opinion was vacated on a grant of rehearing *en banc* on Oct. 3, 1997, it is important to note the EEOC's statement concerning accommodation in "regarded as" cases; the EEOC stated that "there may be merit to the position that a plaintiff, in a 'regarded as' case, is not entitled to accommodation under the ADA (although the Commission has not yet taken an official position on this issue)).

36. EEOC TAM Ch. II § 2.2, Ch. VII § 8.5, ADA Man. (BNA) 90:0512 and 0569.

37. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(k) App.

38. ***Id. See also Francis v. City of Meriden***, 129 F.3d 281 (2d Cir. 1997) (whether an employee is "regarded as" disabled turns on employer's perception, which is a question of intent, not whether he has a disability; individual cannot state a valid "regarded as" claim by alleging that employer believes that some physical condition, such as height, weight, or hair color, renders him disabled.)

39. ***Id.***; EEOC TAM Ch. II § 2.2(b), ADA Man. (BNA) 90:0512.

40. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(l) App.

41. ***Id.***

42. ***Id.***

43. ***Id.***

44. ***Id.***

45. *See, e.g.*, ***Doe v. Kohn Nast & Graf, P.C.***, 866 F. Supp. 190 (E.D. Pa. 1994); ***Stradley v. LaFourche Communications, Inc.***, 869 F. Supp. 442 (E.D. La. 1994); ***Ackridge v. Philadelphia Dep't of Human Servs***, 3 A.D. Cas. (BNA) 575 (E.D. Pa. 1994); ***Canon v. Clark***, 3 A.D. Cas. (BNA) 1308 (S.D. Fla. 1994); ***Jenkins v. State Farm Ins. Cos.***, No. C91-2000 VRW, 1993 WL 165276 (N.D. Cal. May 7, 1993), *aff'd mem.*, 42 F.3d 1400 (9th Cir. 1994); ***Dobre v. National R.R. Passenger Corp.***, 850 F. Supp. 284 (E.D. Pa. 1993).

46. 29 C.F.R. § 1630.2(j)(3)(i).

47. EEOC Comp. Man. § 902.4, 90:0024-26.

48. EEOC Amicus Curiae Brief in ***Deforrest v. Stanley Smith Security, Inc.***, Appellate Case No. A072441 (Brief filed in California Court of Appeal First Appellate District, 7/10/96) at 6.

49. EEOC Comp. Man. § 902.4, 90:0024-27.

50. D.F. Dubin, Environmental Laws and Health Facilities: Americans with Disabilities Act Accommodations Issues May Apply to Environmental Illness, Health Span, Dec. 1994, at 22.

51. ***Id.***

52. 42 U.S.C. § 12131(2).

53. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(m) App.

54. ***Id.***

55. 42 U.S.C. § 12111(8).

56. EEOC TAM Ch. II § 2.3(a)(3)(b), ADA Man. (BNA) 90:0515.

57. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(m) App.

58. ***Id.***

59. ***Id.***

60. ***Id.***

61. 42 U.S.C. § 12113(b).

62. *Id.*

63. 29 C.F.R. § 1630.2(r).

64. H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 45-46 (1990) (hereinafter referred to as "House Judiciary Report").

65. *Id.*

66. 29 C.F.R. § 1630.2(r).

67. *Id.*

68. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(r) App.

69. *Id.*

70. *Id.*

71. House Judiciary Report at 45-46.

72. *Id.*

73. *Id.*

74. *Id.*

75. EEOC TAM Ch. III § 3.5, ADA Man. (BNA) 90:0521

76. *Id.*

77. EEOC TAM Ch. III § 3.1, ADA Man. (BNA) 90:0518.

78. EEOC Interpretive Guidance 29 C.F.R. § 1630.2(o) App.

79. EEOC Interpretive Guidance 29 C.F.R. § 1630.9 App.

80. EEOC TAM Ch. III § 3.6, ADA Man. (BNA) 90:0522.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. EEOC TAM Ch. III § 3.9, ADA Man. (BNA) 90:524.

86. *Id.*

87. *Id.*

88. 42 U.S.C. § 12102(2)(A).

89. *See* Appendix A.

90. EEOC TAM Ch. II, § 2.1(a)(i), ADA Man. (BNA) 90:0509.

91. ***Misek-Falkoff v. IBM Corp.***, 854 F. Supp. 215 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 522 (1995), and *cert. denied*, 116 S. Ct. 1333 (1996).

TECHNOLOGY AND TEACHING SCHOOL LAW

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Gregory A. Boris
University of South Dakota
Vermillion, SD
gboris@usd.edu

Fred Hartmeister
Texas Tech University
Lubbock, TX
FRED.HARTMEISTER@ttu.edu

Kenneth E. Lane
California State University
San Bernadino, CA
klane@csusb.edu

David P. Thompson
University of Texas
San Antonio, TX
DThompson@utsa.edu

Access has continually been an issue facing higher education. Access has traditionally been viewed as providing students with information and often the financial wherewithal to be able to attend a college or university. That view of access has also had the physical dimension of being present physically for the courses offered by the college or university. Combined with the required reading, tests, and some papers/projects, the student acquires the content of the course and is evaluated on that acquisition (Gibson, 1998).

Access has traditionally been viewed as providing the right classes at the right time so students can include them in a program that will lead them to graduating with a particular degree. Palloff and Pratt (1999) noted that our higher education institutions are in transition. They report that one way that colleges and universities are responding to the changes they face is to offer courses via the internet. This allows students to be removed from the constraints of distance and time and instead be freed to pursue the knowledge and skills they desire. In addition to the internet, other technological modes, such as two-way interactive television, are used to provide this access.

Yarborough (1999) presented several premises associated with distance education. Among them he saw distance learning as already an integral part of the educational landscape with it increasing in the years ahead. He indicated that distance education is neither inherently non-personal nor detrimental to the sense of community. He recognized that distance education can be the best way for some students, especially working adults, to learn some material, though it is not for everyone. Finally, he noted that distance learning skills will become more necessary in the future.

The technological tools are but one part of the distance education picture. In addition to having the appropriate technology there is a need to determine the curricular design to be followed. Generating student interaction is also a component that needs attention. Support to the faculty teaching a distance education course also needs attention. Finally, reviewing the course in its entirety is necessary to assure that good practices in distance education are being practiced.

TECHNOLOGICAL TOOLS

The technology used for distance education requires a match between the instructor and the students. The mode chosen by the university must also be accessible to the students in the class. Classes that will be delivered via video tape presume that the students have access to a videotape player. Classes that will be delivered via DVD presume that the students have access to a DVD player. Classes that will be delivered via two-way interactive television presume that students can get to the receiving sites for the telecast. Classes that will be conducted on the internet presume that the students have the necessary technology and internet access to receive the instruction.

Of these technologies, the video player and access to the internet is fairly pervasive. Two-way interactive television access is limited by geography and whether it is congruent with the students' time schedule. DVD technology is becoming more pervasive, but does not have the coverage of the other media.

Developing videotapes of class content work for those classes where the instructor serves as the primary source of information. Production of videotapes is fairly straightforward, with the most basic being a solitary camera focused on a lecturing professor. The addition of a variety of shots and cutting to projection of information adds to the complexity of production. The student then views the tape for the bulk of the course activities.

Use of internet technology presents issues from both the faculty end and the students. The software platform must be easy to use by the professor. It has to facilitate the distribution of information and provide for student-to-faculty and student-to-student communication. Universities have the choice of developing their own software for internet courses or choosing from that which is available from the various vendors . Given that internet-based courses are viewed as quite accommodating to students by allowing them to participate in the class at any time and any place it is important that the server housing the software be up-and-running at all times. In addition there is a need for students to be able to access computer support services over a wide span of hours. Students also must have the necessary equipment for internet-based courses. This includes a computer with the necessary version of a browser and an internet connection. Courses that become more graphically intense or use streamed media require that students have a faster internet connection when compared to courses that are basically text-based. Students must also come into the course with a set of technological skills and not expect that those will be taught as part of the course. These skills include knowing how to: a)navigate the internet, b)do word processing, c)use e-mail and attachments, d)use search engines, and e)follow "hot-links" from one web page to another (McVay, 1998).

Presenting classes via DVD allows for much better video production and graphics than what is found on videotape or CD ROM. The current limitation to this is that production costs are much higher compared to other media at this time.

COURSE DESIGN

A live school law class often is comprised of some combination of faculty presentation, student presentation, discussions, and role play activities. Courses also have a text component that may range from case-based to a more thematic approach that uses case-law and statutes to support the themes. Finally, students in school-law classes often are called upon to delve into actual cases and statutes in the university's law library. In teaching a school law course at a distance these different components must be consciously addressed. While the medium that is chosen in a distance course is different than the in-person version, the content of the course needs to be the same.

Faculty presentation can occur in a variety of ways. For courses that are synchronously delivered, the lecture is the primary mode this is done. The lecture can be captured on video and used for asynchronous delivery via video-tape, streamed, CD ROM, or DVD. Courses that are delivered through the internet can use the lectures and also provide the content of the faculty presentation on web-pages (http://info.med.yale.edu/caim/manual/contents.html). The web-pages that are developed need to follow the

principles of good web-page design. Nash and Dougherty (1999) noted that big web pages do not necessarily make for a good web site. Such a site can overwhelm the student and be very difficult to navigate. They encourage faculty to make courses more than an independent study version of a live course and encourage active learning.

To address student presentations at a distance poses some challenges. When students are in the same place at the same time in a two-way interactive environment, such as two-way television, the students can present material much in the same way as they would in an in-person class. Given that many distance classes are asynchronous, presentations become more difficult. Student presentations in such an environment can come through class-wide distribution of material prepared by the student. The easiest manner of this is through e-mail with the presentation being either in the text of the document or as an attachment. Making a visual presentation becomes more difficult as the technology may not be readily available to the students.

Access to primary sources proves difficult in distance school law courses . West-Law online (http://www.lawschool.westlaw.com) which provides access to a great many primary legal documents is generally not available to education graduate students. Faculty still have several options to enable students to access primary sources. One is to use one of the legal search engines (Washlaw, Findlaw) which gives students the ability to read recent cases at the state and federal level. Faculty can also encourage their school library to establish (if it hasn't done so already) an electronic reserve readingshelf and place the necessary cases into that medium (Wood, 1999).

Chickering, Gamon, Barsi, & Poulson (1989) identified seven principles for effective college teaching. These principles apply to both in-person classes and those at a distance.

The first of these principles is to encourage student-faculty contact. At a distance this can be difficult, particularly in an asynchronous environment. To address this faculty may conduct a live orientation session to the class. The faculty may also have interaction via e-mail, bulletin boards, and on the phone.

The next principle is to encourage cooperation among students. Chickering, et al (1989) note that learning is enhanced when it is "more like a team effort than a solo race (p. 12)." This can occur at a distance by creating discussion groups, group projects, and other group activities for the students.

The third principle is to encourage active learning. Chickering, et al (1989) indicate that learning is enhanced when students communicate about what they are learning and relate it to past experiences, current situations in their lives, and anticipated activities. This can occur at a distance through discussion groups and faculty response to student comments.

The fourth principle is to give prompt feedback. Distance courses often involve more writing on both the part of students and faculty. With the ubiquity of e-mail, the opportunity for feedback from faculty to students is great and needs to be done.

The fifth principle is to emphasize time on task. Often, people look at distance education courses, particularly those online, as being easier to learn from than those which are live. The complication that

occurs is that time sometimes slips away and students may fall behind in what is being done. Students need to devote time to a distance course much as they would a live course. For those courses that are asynchronous in nature, successful students have been seen to set aside specific times during the week to address their course activities.

The sixth principle is to communicate high expectations through good practice. In a distance environment, this is particularly crucial as the instructor often models what is expected through the work that is presented. Faculty teaching a distance course must explicitly state what they want from students as the in-person opportunities where clarification often occurs, particularly in an asynchronous course, are limited.

The final principle is to respect diverse talents and ways of learning. Taking a course at a distance is not for everyone and this must be acknowledged from the outset of the course. Easy withdrawal or transfer to an in-person section from the distance course must be available for those students who decide that the distance offering of the course is just not a good way for them to learn.

INTERACTION

The first and second principles identified by Chickering, et al (1989) emphasize interaction between students and faculty and between students themselves. In a live distance offering of school law (as in two-way interactive TV), the student-faculty interaction can occur much as it would in the in-person version of the class. The student-to-student interaction is a bit more difficult, but can be fostered through e-mail or bulletin boards.

For the asynchronous distance delivery of school law (internet, videotapes, etc), the issue of interaction deserves more attention and takes more time to deliberately plan. The two major modes of asynchronous interaction are e-mail and bulletin boards. The major mode of synchronous interaction at a distance is internet chat. To successfully handle this type of interaction the instructor needs to limit the course size so that the communication task isn't overwhelming. Silverman (1999) suggested limiting class size to 17-20 students so that effective interaction between students and between students and faculty can occur. Managing class discussion on bulletin boards with as many as 20 students in it can be difficult and instructors may want to divide the students into smaller groups to facilitate better interaction.

FACULTY SUPPORT

The image of a distance education instructor as being technologically competent is one that can easily be drawn from the information presented. While instructors need technological skills it is important that the institution support them in their development and delivery of distance education courses. To put a course together for effective delivery over a distance a variety of supports are necessary.

It is important that individuals who will be teaching over a distance be given instruction on how to effectively use the medium chosen. Distance teaching is more than just doing what one does in the

classroom, though the curricular goals are the same. To prepare and support distance instructors institutions must have a series of supports in place.

Universities expecting faculty to teach in a distance mode need to instruct faculty in the use of that mode. In addition to the didactic instruction on the use of the medium, faculty would also benefit from taking a course in the medium that they would be using (Rose, Schoeny, & Hsi,, 2001). So, a teacher who would be teaching school law online would benefit from taking a course online. In that way the instructor can see the strengths and pitfalls associated with that medium and adjust expectations accordingly. Some form of release time or monetary subsidy also assists in faculty learning the requisite distance education skills.

When an institution decides to venture into the distance education environment, it is important for the university to be ready to assist with the production of the course. For a teacher using two-way interactive television, it is important to have the technical staff there to make sure all is working and to intervene when necessary when technical difficulties arise. For a teacher using an online form of instruction it is necessary for the school to deal with the technical aspects of the course, such as managing the server, providing the necessary log-ins and passwords, and the like. Many institutions also have a different form of registration for distance courses, and the infrastructure needs to be in place to take care of that.

Once a course is up-and-running there are on-going needs that require assistance from the school. Primary among these is to have school support when technical problems arise. Managing e-mail and tracking student contributions to a bulletin board also can be helped through non-faculty assistance. Sometimes just downloading course-contributions, tests, and assignments from e-mail can be delegated to a university-provided assistant.

Most institutions have evaluation of in-person courses. Such mechanisms need to be adjusted to reflect the distance nature of the course. In addition, the medium of course evaluation needs to be adjusted from paper-pencil to perhaps online. These are tasks appropriate for an institution to undertake.

COURSE REVIEW

The development of a distance education course brings into play a medium that is often new to the instructor. The question of whether the instructor has addressed the aspects central to making teaching in the new medium successful comes into play. Some institutions have instituted a review process to ensure that pedagogical approaches are congruent with the medium used.

An example of this is found at the University of South Dakota where faculty review proposed online courses. When an area is noted as being in need, a support person from the school can assist the instructor in addressing that area. The areas that are reviewed are:

1) A course description should be included which clearly describes the course, in a manner understandable to the student and course materials and learning activities should match the course description and identified desired course outcomes

2) A syllabus is provided that clearly defines the expectations for the course, which should be available at the time the course is initially advertised.
3) The means for interaction are clearly defined for the students.
4) Assignments, assessment, relative importance of and weights of various assignments are clear to students.
5) Ways in which students get feedback on their assignments are clearly stated, particularly the posting of grades.
6) Individual accommodation will be provided when documented need exists.
7) Faculty provided the students with the academic policies relative to the course
8) Students are provided information on how to contact the instructor and other contact persons related to the course delivery.
9) Includes course material requirements, such as texts, hardware and software needs.
10) All course links are active and current.
11) Keep navigation buttons consistent in both location and design.
12) Link each page back to the course's main page.
13) Include a title header on all pages
14) Keep backgrounds simple and use contrasting colors and appropriate fonts to make text easy to read.

The review tends to be more along the technical end of things, making sure that the online course is as user-friendly to the student as possible.

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TECHNOLOGY AND TEACHING SCHOOL LAW

Using Graphics to Enhance the Teaching of School Law

Frances R. A. Paterson, J.D., Ed.D.
Associate Professor, Department of Educational Leadership
Valdosta State University, Valdosta, Georgia
frap428@aol.com

I. Sources of images
  A. Print sources
    1. Books
      a. Illustrated Supreme Court Decisions
      b. *Lessons of a Century* (published by Education Week)
      c. School: The Story of American Public Education
      d. We the Students: Supreme Court Decisions For and About Students
      e. In the Light of Evolution: Science Education on Trial (National Association of Biology Teachers)
      f. Various high school civics textbooks
    2. Periodicals and ephemeral materials
      a. *Education Week*[1]
      b. Your local newspaper
      c. News magazines
      d. Advertising circulars
  B. Online sources (Freedom Forum at www.freedomforum.org is an excellent source)

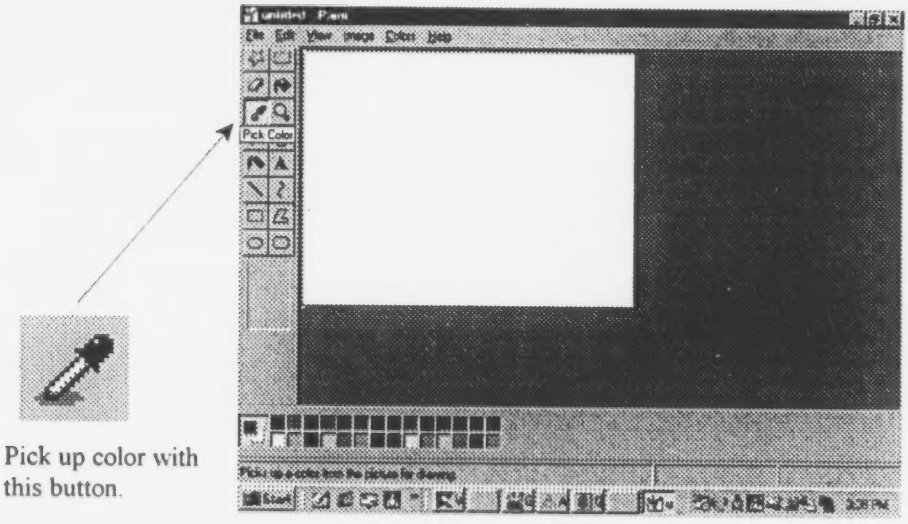
II Acquisition
  A. Print materials—scanning
    1. 300 dpi works best
    2. Use grayscale for black and white photographs
    3. Too light images (some simple designs are printed in a pastel or light gray color that the scanner doesn't pick up).
      a. Copy on a copying machine using the darken function
      b. Scan and use Paint to remove speckles[2]
        (1) Some scanner software can despeckle.
        (2) You can remove large areas of speckling by selecting and deleting or cutting.
        (3) Smaller areas of speckling or speckles close to the image can be painted over white using Paint.
        (4) Paint will also allow you to change the color of the image itself to the original or a new color.

---

[1] *The Chronicle of Higher Education* is a good source for pictures if you teach higher education law.

[2] Paint is located under Accessories in Windows.

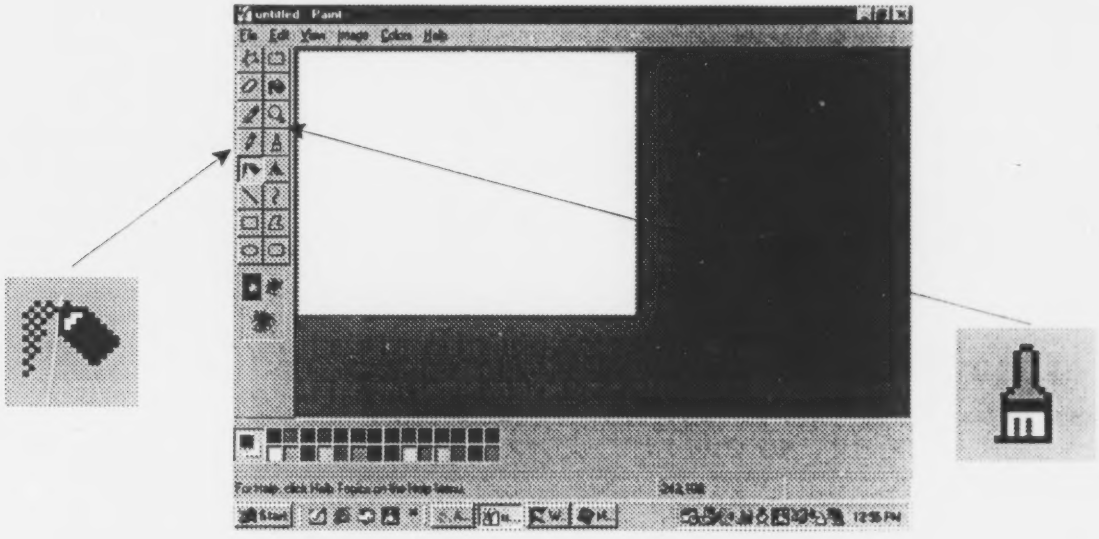
4. Low tech fixes
   a. Creased or folded materials can be ironed with a DRY iron on the cotton setting on a hard surface between pieces of copy paper.
   b. Repairing torn pictures or splicing a double page spread
      (1) Clay-coated (glossy) paper: Tape on the front with removable tape, then tape on the back with removable tape. When the image is lined up, replace the removable tape on the front with transparent (not satin or matte) tape. Use Paint to repair any misalignment or places where the tape shows. You may want to check on Power Point to see if anything actually shows before you go to the trouble of editing the image.
      (2) Of course, you can tape matte images, such those from newspapers and most books with Magic tape. Again, the removable kind works best.
      (3) With Paint you can smooth a seam caused by joining two parts of a double page spread. smooth away a crease or fix a variety of problems
         (a) Don't forget that the eye tends to see in patterns, to follow a straight line so it might not be necessary to fix all the places the seam or crease shows—just break up the "line" in several places.
         (b) You can break up a line or fix a tear by "picking up" an appropriate color and either painting or spraying it over the offending spot, or



Pick up color with this button.

BEST COPY AVAILABLE

(c) You can also select copy and paste a square or rectangle of a like-colored section. Often, the best place to select is the portion right beside the damaged area. You can then "pick up" an appropriate color (from the "patch" or elsewhere on the image) and brush or spray (I find spraying works best) to smooth out any hard edges. Sometimes the spray is hard to control and just setting the cursor, which will be two crossed lines, over the area and just clicking works best. For larger areas, you can click the mouse and move over the area you want to cover.



B. Online images

1. Right click and then click "copy"
2. You can paste directly into Power Point or into another program, such as Paint, Photo Editor, or the software that is linked to your scanner, so you can manipulate and alter the image. You can also copy and paste from one editing program to another depending on the kind of editing you want to do to enhance the image, and, of course, you can save directly from these programs (and insert in Power Point) or just paste directly into Power Point.
3. Table and chart problems
   a. Sometimes, especially with tables, it is easier to print out and scan from hard copy. Sometimes, you may need to manipulate the image as discussed in the section about scanned images.
   b. Charts, like circle graphs and bar charts may not successfully format when you are making transparencies. Better results can be obtained by making Excel charts using data from the source.

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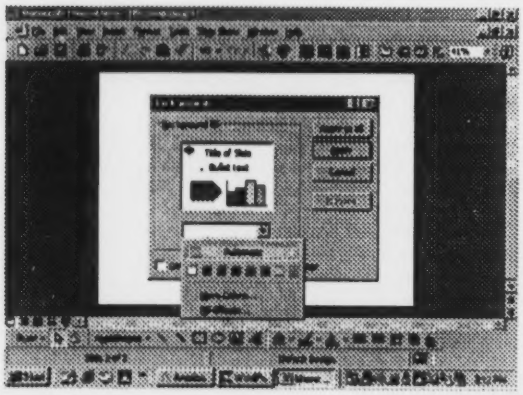
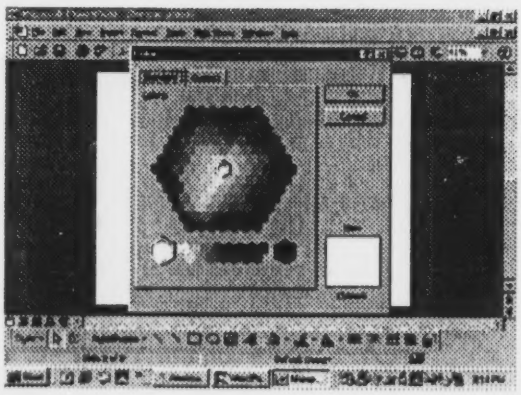
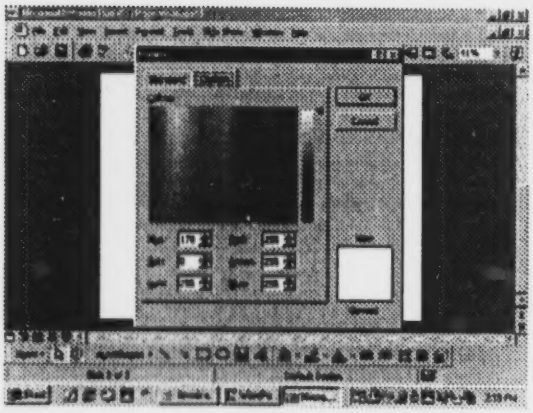
C. Sometimes the background of an image looks white but when it is placed in a Power Point slide it appears slightly tinted making it apparent where the image ends and the background of the Power Point slide begins. You can, of course, change the background of the slide itself to match.



In Power Point under Format< click on Background, then More Colors



And then on Custom where you can slide the markers about and/or change the values incrementally to get the perfect match. As shown below



You can change the numbers in the boxes for red, green, and blue to get a close to fool-the-eye, perfect match, i.e., slide background to background of your graphic.

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III Formatting—Because I frequently teach my masters level school law course off-campus at sites where I don't have access to computer equipment, I have format those slides in portrait orientation and use as a transparencies.

IV. Organizing

A. Saving (If want to save the image as a file rather than or in addition to placing in a Power Point, JPEG files take up less hard drive space).

B. Documentation

1. Be sure to keep a record of where you found the image. On Power Point I give a citation at the bottom (you can use a smaller font).
2. Keeping a copy of the accompanying article is helpful. Articles can be scanned and converted by OCR to conserve hard drive space.
3. I recommend keeping all graphics together with subfolders for each course.
   a. If there aren't a great many images, e.g. higher education law, then all the slides can be kept in one file.
   b. For some courses, e.g., a general school law courses, it might be better to set up a sub-subfolder "By Weeks" with a separate file for each class.
   c. Under the "Power Points" subfolder, I have a separate file for new images that I haven't yet added to my class presentation. Or I may indicate new images when I am organizing by weeks with a Power Point slide indicating that the following images are new.
   d. After I've taught the course using transparencies or Power Point graphics, I create a new file named "New" with the date, e.g. "spring—summer 01" which I use as temporary storage place for new graphics. The "New" file is within the Power Points subfolder which, in turn, is filed under the course name.
4. For images that would work with more than one course I have a folder titled "My Graphics" with a subfolder titled "Professional." I sometimes make a Power Point slide with just a notation about where a suitable image is stored.
5. When using a date for a file name, the following format allows files to fall automatically into chronological order: year/month/day, e.g. 01.11.15. If additional files are made for the same date, use a letter, e.g. 01.1 1.15a and 01.1 1.15b.

ISSUES FACED BY SCHOOLS IN THE DIGITAL AGE

Craig R. Wood
McGuireWoods LLP
Court Square Building
310 Fourth Street, N.E., Suite 300
Post Office Box 1288
Charlottesville, Virginia 22902-1288
(434) 977-2558

Dana T. Buckman
McGuireWoods LLP
1750 Tysons Boulevard, Suite 1800
McLean, Virginia 22102
(703) 712-5004

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ISSUES FACED BY SCHOOLS IN THE DIGITAL AGE

INTRODUCTION

Research and experience have shown that when technology is used effectively in education, it can positively enhance students' educational attainment and skills acquisition.

The message has gotten out. By the fall of 2000, almost all public schools in the United States had access to the Internet: 98% were connected.[1] In comparison, only 35% of public schools had access to the Internet in 1994. Unlike in previous years, there were virtually no differences in school access to the Internet by school characteristics, such as poverty level and metropolitan status, in 1999 or 2000. This has largely been made possible by the "E-rate" program, which charges a special fee on phone bills to provide funds to subsidize internet connections for schools and libraries.

The Internet provides a powerful tool for innovation in teaching, learning and communicating. E-mail is replacing the fax machine, and will soon make hard copy mail obsolete. The breakneck speed of technological development has surpassed the ability of the law to provide meaningful rules and boundaries.

Along with the benefits of technology in schools come a host of legal and practical implications for school boards and administrators. This article addresses school district liability in such matters as sexual harassment and discrimination and universal access for individuals with disabilities. It analyzes issues regarding e-mail and the very real possibility that school employees will be forced to turn incriminating information over to the other side in the course of litigation. The article also focuses on attorney-client privilege in electronic communications and the obligation of school board members to restrain from inadvertently violating their state's open meetings law while enjoying the ease and convenience of electronic communications.

School leaders and their legal counsel must develop thoughtful and effective policies to regulate Internet usage, and then revise those policies as the law in this area develops. Copyright law, acceptable use policies, and privacy issues all demand attention. The Internet, properly managed, can revolutionize education. But like all great innovations, it is subject to abuse, and this risk must be managed to assure a vigorous and appropriate learning and working environment.

I. SCHOOL DISTRICT LIABILITY FOR ELECTRONIC COMMUNICATIONS

Over 40 million users send 60 billion e-mail messages a year. Students and teachers are increasingly proficient in the use of e-mail and often rely on it as a primary source of communication. At its best in the education field, e-mail provides a forum for students and teachers to interact and exchange academic-related ideas. At its worst, e-mail can be a costly waste of human resources and a tool of harassment and discrimination.

The increased use of communications technology by administrators, teachers and students exposes school districts to potential legal liability and practical difficulties in a number of ways. Many existing claims, such as sexual harassment, wrongful discharge and discrimination take on a new dimension when the computer is the medium for the wrongful behavior, or when electronic communications are used as evidence.

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[1] 2001, Internet Access in U.S. Public Schools and Classrooms: 1994-2000. See http://nces.ed.gov/pubs2001/internetaccess.

A. Sexual Harassment

Not too long ago, e-mail consisted of text messages alone. This is no longer the case. Users now have the capability of sending and opening attachments with pictures, voice recordings, and even video. Unfortunately, some users send pornographic pictures, obscene recordings or links to pornographic websites as attachments to unsuspecting readers. For example, a school employee might send a pornographic e-mail joke or an e-mail with an attached pornographic picture to an unsuspecting co-worker. Without appropriate safeguards, a school district could be held liable for such actions if they are severe or pervasive.

A sexually hostile work environment claim may arise from conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.[2] Under Title VII of the Civil Rights Act of 1964, even verbal or written conduct can give rise to a "hostile environment" claim if it is sufficiently severe and pervasive to alter an employee's working conditions.

The inquiry in these types of claims often focuses on what type of improper behavior constitutes severe and pervasive conduct. In Harley v. McCoach, the plaintiff sued her employer for race and sex discrimination based in part on an e-mail message sent by her supervisor in which she was referred to as "Brown Sugar."[3] The court held that one e-mail containing a racial epithet, combined with a racial slur uttered by a supervisor and teasing by a co-employee, were not sufficient to create a racially hostile work environment. The court relied on a Third Circuit Court of Appeals opinion, Drinkwater v. Union Carbide Corp., which held that "two comments . . .are insufficient in and of themselves to support a hostile environment claim. Hostile environment harassment claims must demonstrate a continuous period of harassment, and two comments do not create such an atmosphere."[4] The court in Harley likewise found that three incidents were insufficient to create a racially hostile work environment.[5] In another case, Chevron Corporation agreed to a $2.2 million settlement of sexual harassment claims filed by four women based in part on off-color jokes transmitted via e-mail.[6] These cases indicate that in some instances occasional, sporadic use of inappropriate e-mail may not constitute sexual harassment. The inquiry is a fact-based one, and it is within a court's power to find sexual harassment where it deems the conduct sufficiently egregious. Therefore, schools must institute strong policies against sexual harassment to prevent improper conduct, including in electronic communications, and take adequate remedial measures when it occurs.

Persistent offensive e-mails by co-workers, supervisors or students can create a hostile environment claim and the standard of liability that applies in each case varies.[7] The standard for finding a school liable for sexual harassment by its employees differs depending on whether the victim is an employee or a student.

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2 See Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).

3 928 F. Supp. 533 (E.D. Pa. 1996).

4 904 F.2d 853, 863 (3d Cir. N.J. 1990).

5 Harley, 928 F. Supp. at 541.

6 See Lisa Stansky, "Changing Shifts: Does Anyone Still Work Here?", 83 A.B.A.J., June 1997, at 58.

7 In addition to federal anti-discrimination laws, several states have enacted legislation prohibiting sexual harassment in schools.

Where a teacher or staff member alleges that an administrator is the harasser, vicarious liability principles apply. In other words, the school district may be held legally responsible for a hostile environment created by a supervisor with authority over the employee.[8]

In such a case, an employer may escape paying money damages only where two elements are present: (1) evidence the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior and (2) evidence the employee failed to take advantage of corrective opportunities available to the employee.[9] This standard is fairly strict, and unless schools take strong preventive measures they may not be able to prevent future liability. Schools must take special care in hiring and monitoring supervisors, implement a clear, specific and comprehensive sexual harassment policy with well-defined complaint procedures, disseminate and periodically review the policy with all employees; and investigate and remedy all complaints of inappropriate conduct.

The legal standard changes somewhat where a teacher sexually harasses a student. The United States Supreme Court has held that a school district may be held liable under Title IX for a teacher's sexual harassment of a student.[10] The Supreme Court ruled in Gebser v. Lago Vista Independent School District, however, that the school district may be held liable only if a school district official with authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.[11]

The Supreme Court analyzed the issue of student-on-student sexual harassment in Davis v. Monroe County Board of Education.[12] The Court held that a private damages remedy can be levied against a recipient of Title IX funding, but only where the plaintiff can show the school officials acted with deliberate indifference to known acts of harassment, and that the harassment was so severe and pervasive that it constructively barred the plaintiff's access to an educational benefit or opportunity. This stringent standard makes recovery difficult, but school officials are advised to take appropriate remedial action to prevent serious claims.

While a court may find that a school district is not legally responsible for sexual harassment by a student or teacher, deterring offensive conduct is cheaper and more productive than defending a lawsuit. The institution of an e-mail and Internet policy helps to provide an affirmative defense for a school district being sued in a sexual harassment case. Under such a policy, all users should be required to review and sign an Acceptable Use Policy statement that prohibits online sexual harassment and indicates agreement to comply with its provisions. If a district becomes aware of the sexual harassment of a student or teacher via e-mail, the district must take immediate steps to halt the harassment, including limiting the offender's use of e-mail privileges, or risk being held liable for sexual harassment. Similarly, if a teacher or administrator becomes aware of a student's misuse of e-mail privileges, those privileges should be restricted or terminated. As a further measure to deter sexual harassment suits related to e-mail misuse, a district should issue guidelines for reporting e-mail misuse.

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8 See Burlington Industries v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

9 Id.

10 See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 63 (1992).

11 118 S. Ct. 1989 (1998).

12 526 U.S. 629 (1999).

B. Discrimination Claims

Just as e-mail may be a tool used by sexual harassers, it may also provide fertile ground for discrimination claims ranging from age and disability discrimination to racial and gender discrimination.[13] For example, a teacher may use e-mail to send racially offensive jokes to other teachers. Or an administrator may make an off-handed comment in an e-mail relating to the termination of an employee, providing ammunition for a later age discrimination or disability discrimination claim. Such electronic communications could form the primary evidence in a discrimination case.

School districts should think carefully about access issues and potential claims of differential treatment by students or employees. An equitable approach to technology in the school district should allow schools to reduce the possibility of litigation at an early stage.

C. Threats and Defamation

In some cases, students send other students threatening e-mail using school computers. Students send threats to a teacher's school e-mail address, or send e-mail bomb threats to the principal.

Students may also send defamatory e-mails to other students, who then publish it to others by a click of the "forward" button. Policies governing the acceptable use of e-mail are critical in preventing irresponsible conduct by students from burgeoning into significant litigation or criminal charges. Such policies are also vital in defending against these actions.

D. Regulating Use of the Internet

1. Regulating Student Use of the Internet.

E-mail, Internet websites and chat rooms can be effective means of communicating valuable information. But they can also communicate viewpoints that are controversial. If schools allow their website to be an open forum, then any student or even non-student may be able to post his or her viewpoints. Religious, political and philosophical debate can take place, and may not be restricted.[14] However, the school can make the site a closed forum and regulate the contents as it does other curriculum-related written material. See Hazelwood School Dist. v. Kuhlmeier.[15] The Court in Hazelwood stated that "school facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers and other members of the school community."[16]

Generally, schools can impose restrictions on a wide variety of student expression, including criminal speech, obscene or rude language, false or defamatory statements, speech that violates privacy, acts of copyright infringement and plagiarism, and other speech that is inappropriate in an educational

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[13] See e.g. Wilson-Simmons v. Lake County Sheriff's Dep't., 982 F. Supp. 496 (N.D. Ohio 1997); Kepple v. GPU, Inc., 2 F. Supp. 2d 730 (W.D. Pa. 1998); Strauss v. Microsoft Corp., 856 F. Supp. 821 (S.D.N.Y. 1994).

[14] See Board of Education of Westside Community Schools v. Mergens, 109 S. Ct. 3240 (1989)

[15] 484 U.S. 260, 273 (1988).

[16] Id. at 267 (citations omitted).

setting. The Supreme Court established the legal framework of First Amendment rights of students in Tinker v. Des Moines Independent Community School District.[17] It that case, the court recognized student expressive rights and placed a significant burden on the school to justify punishment of speech by demonstrating that engaging in the forbidden conduct would disrupt, or "materially and substantially interfere with the requirements of the appropriate discipline and operation of the school."[18] The Court held that the school had to demonstrate that such disruption actually took place in order to restrict such speech.

Although there is limited caselaw applying the outlined legal principles to Internet and e-mail use by the students, courts considering speech that occurs off school grounds (including websites and e-mails) have concluded that school officials' authority over off-campus expression is much more limited that expression on school grounds.

For example, in Emmett v. Kent School District No. 415, a student posted a web page on the Internet that was created from his home without using school resources or time.[19] The web page was entitled the "Unofficial Kentlake High Home Page," and included disclaimers warning visitors that the site was not sponsored by the school, and that it was to be used for entertainment purposes only. It contained some commentary on the school administration and faculty. It also posted mock "obituaries" of at least two of the students. "Obituaries" were written tongue-in-cheek, inspired apparently by a creative writing class in which students were assigned to write their own obituary. Based on the content of the web page, the school suspended the student for five days. The court held the student's speech was entirely outside the school's supervision or control and granted the student's request enjoining the school from suspending him. In granting the temporary restraining order the court noted that the school failed to show that mock obituaries and voting on this site were intended to threaten or actually did threaten anyone.

In Beussink v. Woodland R-IV School District, the United States District Court for the Eastern District of Missouri also addressed the issue of whether a student could be disciplined for speech that appeared on the Internet in a website created by the student.[20] Beussink created a website that used crude and vulgar language and was highly critical of the school administration, the teachers, the principal and the school's website. Beussink created the website at home and testified that he never intended that it be accessed at school. The information about the web page made its way to the school grounds and the website was accessed by one of the students there. The principal disciplined Beussink because of the website and issued a disciplinary notice suspending Beussink for ten days. The Court determined that the evidence presented did not establish that Beussink was disciplined because of fear of disruption or interference with school discipline but rather, was disciplined because the principal was upset by the content of the website. The Court thus concluded that the website did not materially and substantially interfere with school discipline and granted the student's injunction precluding the school from using his ten day suspension in its calculation of absences, which would have reduced his grade point average for each unexcused absence over ten.

However, in J.S. v. Bethlehem Area School District, the court affirmed a student's expulsion for creating a threatening website.[21] The site included derogatory and offensive remarks about many of the schoolteachers, and contained pictures of one of the teachers beheaded with blood dripping from the neck. The site solicited, mockingly or not, money to pay a hitman to eliminate the teacher. The court agreed that

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17 393 U.S. 503 (1969).

18 Id. at 509.

19 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

20 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

21 757 A.2d 412 (Pa. Commw. Ct. 2000).

the website, which caused the teacher to take a sabbatical for medical attention, disrupted the school operation and interfered with the educational process. The court sustained the student's expulsion and held that the school did not violate the student's First Amendment rights.

Websites that include links to third parties' sites may also subject schools to liability. As public entities regulated by the First Amendment, schools may be challenged for the manner in which they include or exclude links. A school with a chess club might include links to websites discussing chess strategies. The Christian Club might then request links to sites promoting religious indoctrination. If the school refuses to post the link for the Christian Club, it may be sued by club members for infringing their speech and religious freedoms. However, if the school posts the link it may be sued for violating the wall between church and state.

This is a different issue than allowing the clubs or groups themselves to post on the web, and communicate their activities and ideas with members. Equal access demands that this be done for all groups if it is done for one, but it has positive educational implications. School must appreciate the Fist Amendment expression rights of students may be broader than equal access participation rights.

Additionally, schools often provide E-mail addresses for students. Likewise, they often monitor the content of the e-mail sent and received.

The Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§2510-2520, makes it a criminal offense to intercept electronic mail while it is in transit. However, it is not unlawful to intercept the e-mail if at least one party to the communication gives consent.[22] Schools should not give students access to e-mail without first obtaining written permission from both the student and the student's parents.

In the aftermath of the Columbine High School shootings and bombings, much attention was given in the press to the Internet activity of the perpetrators. A parent had complained to police authorities about the violent and threatening nature of the Internet communications.

Had the students been using school computers, or school Internet access, the school could have been sued for negligence in regulating and supervising its student activities. One way to prevent such suits is with appropriate use policies.

Congress passed the Communication Decency Act (CDA), 47 U.S.C. §223, which imposed criminal penalties for knowing transmission of obscene or indecent messages to any recipient under 18 years of age.

In Reno v. American Civil Liberties Union, the Supreme Court held that the CDA was overbroad and violated the First Amendment.[23] The Court criticized the CDA for undefined terms such as "indecent" and "patently offensive" that described large amounts of non-pornographic material with legitimate educational value. For instance, the Court noted that the CDA's prohibitions might include material on safe sex, artistic material including nudity, and "arguably the card catalog of the Carnegie library."

The Reno ruling should in no way deter schools from acting on student misbehavior. Clear policies implemented with due process should punish and deter pornography, sexual material, hate speech, violent content and other patently inappropriate material.

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22 See Bohach v. City of Reno, 932 F. Supp. 1232 (D. Nev. 1996).

23 117 S. Ct. 2329 (1997).

2. Acceptable Use Policies for Students

Following are some recommendations for implementing acceptable use policies:

a. The policy should state what is an acceptable use, what is not, what discipline will be imposed for violations, and what oversight will be provided.

b. The policy should describe the educational philosophies and strategies to be supported by Internet access.

c. The policy should state that any Internet use is a privilege, not a right, and will be withdrawn if abused.

d. The policy should state that off-campus Internet use that causes or creates a significant risk of causing on-campus disruption is prohibited and violators will be punished.

e. Be sure to keep school websites as closed forums, and make clear that the school will monitor all content and remove any inappropriate material.

f. If the school website includes links to third party sites, an appropriate disclaimer should be posted that the school does not endorse the contents of the linked sites.

g. All e-mail and web posting should be subject to review, and no access to internet or e-mail should be granted without student and parent consent to interception and review of the contents.

h. All users and their parents should sign a form indicating their intent to abide by the acceptable use policy.

i. Students should be advised not to give personal information over the Internet, such as name, address, school, or telephone number.

j. Filtering software should be employed, especially with elementary and middle school students.

k. Obscenity, offensive language, pornography and sexually explicit material should be prohibited.

l. A basic warning and explanation of copyright laws should be included, and the acceptable use policy should require compliance with copyright law.

m. The policy should prohibit Internet usage for commercial transactions or activity.

n. The policy should prohibit access to websites that sell term papers and book reports.

o. The policy should have security and virus protections. Generally, this means no downloading of software or data except to a diskette, which can be virus scanned before being utilized.

3. Regulating Employee Use of Internet

Training. Many school systems have allowed employees to use school computers for Internet access and research with little or no guidance or supervision because the schools lack the funds to provide formal training programs, and the personal use at least breeds familiarity with the technology. This practice has serious legal implications. Unfettered and unsupervised use of e-mail and Internet access by irresponsible personnel inevitably creates liability for the school. Formal, structured training must be made available if the schools are to recoup their investment in technology without liability exposure.

Privacy. Employees may believe they have a "reasonable expectation of privacy" in e-mail and personal computer files. School policy should state clearly that computers are the property of the schools, any use of the computers by employees is subject to monitoring, and any inappropriate use of the computers will result in disciplinary action.

As was mentioned earlier, the Electronic Communications Privacy Act ("ECPA") prohibits interception of e-mail, unless one of the parties consents. The policy should either require written consent to monitoring or state that use of the school's computer implies consent to interception of any messages sent or received electronically.

Free speech. Employees may want to use school computers and websites to make political, religious or other viewpoint expressions. While schools cannot restrict an employee's right to express oneself on the internet from one's own personal computer, schools may control expression on their own systems. Matters of public concern are protected speech in an open forum (e.g. matters related to curriculum, budgets or policy). Matters of private concern are not protected, and may be prohibited even in an open forum (e.g. teacher complaints about their own salaries, assignments, or policy applications).[24] The best policy is to limit technology use to the employees' performance of their jobs, maintaining a closed forum. In that event, the schools can prohibit political or religious expression. As the Supreme Court stated in Hazelwood, "[i]f the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers and other members of the school community."[25].

Restrictions on Internet Access. The most significant decision to date on restricting faculty access to web research was handed down in Virginia. In Urofsky v. Gilmore, the Fourth Circuit ruled that the Virginia statute barring state employees from downloading or displaying "sexually explicit" material does not violate the First Amendment.[26] State college and university professors had challenged the statute as an overbroad restriction on academic freedom.

The court noted that "the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as a sovereign to restrict the speech of the citizenry as a whole."[27] The overbreadth argument was defeated by an exception in the statute that allowed for bona-fide research so long as the professor obtained prior approval.

Given that courts typically afford much greater control over speech in elementary and secondary schools, the ruling in Urofsky signals public school administrators that they can exercise reasonably tight control over the content of web research as long as legitimate, appropriate research is permitted. Prior approval of web research projects is a reasonable and prudent addition to the Internet Acceptable Use Policy.

4. Acceptable Use Policies for Employees

a. As discussed above, personal use may be prohibited if the school district wants to establish a bright-line policy on e-mail and Internet use. The school may want to allow incidental personal use with

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[24] See Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Education, 391 U.S. 563 (1968).

[25] 484 U.S. 260, 267 (1988).

[26] 167 F.3d 191 (4th Cir. 1999). See also Teague v. City of Flower Mound, 179 F.3d 377 (5th Cir. Tex. 1999).

[27] Id.

the understanding that all transmissions are subject to review, and inappropriate use of technology will result in disciplinary action.

b. The privacy issue should be disposed of with a clear statement that all use of school computers is monitored and supervised, and inappropriate content will result in disciplinary action. Employees should sign an appropriate waiver before being given Internet access.

c. The policy should have a reminder that any use of the computers to transmit material that has racial, sexual, ethnic or other content that might be perceived as abusive or insulting will result in disciplinary action. Research projects that could violate the letter of the harassment policy should receive prior approval.

d. The policy should prohibit political, religious or other viewpoint expression on school websites or via school e-mail, except as it relates to bona fide research or bona fide curriculum-related speech.

e. The policy should contain an explanation of copyright laws and a prohibition against infringement.

f. The policy should prohibit the use of school computers for charitable solicitation, advertising or other business solicitation or fundraising.

g. The policy should include strong security language regarding passwords, software integrity, and downloading any applications or software that could introduce viruses into the system. Nothing should be downloaded without first being virus scanned unless the integrity of the data is well established.

E. COPYRIGHT ISSUES

1. Understanding the Law.

This article cannot cover in detail the myriad copyright issues that can arise in student and faculty use of the Internet. However, it will discuss briefly the issues that should be considered when preparing an Acceptable Use Policy.

Copyright laws protect the intellectual property value of literary, artistic and dramatic works. The copyright notice or registration is required.

Closely related to copyright is the importance of academic integrity; the desire to instill honesty and creativity and to discourage plagiarism. The Internet makes it very easy to "cut and paste" ideas and writings of others.

Copyrighted work can still be used for teaching and research. The essence of the **fair use doctrine** is that the person may not use the work in such a manner that it has the potential to divert income from the creator. Courts consider four factors to determine fair use:

1. **Purpose** - A fair use is not for commercial gain. It is for non-profit or educational usage.

2. **Nature** - Is the work fact or fiction? A fair use generally is a fictionalized representation; not one based on an actual fact. For instance, a parody of a copyrighted work would be a fair use.

3. **Substantiality** - A fair use involves only a small portion of the copyrighted work, not most or all of it.

4. **Market Effect** - A fair use does not significantly impair the ability of the creator of the work to profit from the work.

*Copyright laws apply to materials on the Internet to the same extent as materials in a non-*electronic form. Yet the Internet offers vast access to copyrighted material, and the ability to copy, download, forward and otherwise control and use the material.

Face-to-face teaching or display of a work by instructors or pupils in a non-profit educational institution, classroom, or similar place devoted to instruction does not infringe copyright unless the display is of an audiovisual work that was copied unlawfully, and the person displaying it had reason to know is was copied unlawfully.[28] Consequently, material obtained from original sources, or apparently legitimate sources, may lawfully be used in computer-aided instruction.

The Digital Millenium Copyright Act of 1998, Public Law 105-304 ("DMCA") was an attempt to make copyright law applicable to computer technology. However, fair use as described above is not altered as it appears in the DMCA. The DMCA seeks to promote distance learning through digital technologies, and to deter circumvention of technological methods designed to protect copyrights.

The American Library Association developed "User Community Principles" relating to fair use distance learning and other technology/copyright interfaces. An excellent resource, the ALA guidelines can be accessed at www.ala.org/washoff/dmguide.html.

2. Policy Considerations.

1. An Acceptable Use Policy for students and faculty should include copyright compliance as a condition of access to technology.

2. Both the school librarian and the technology director should understand and be able to advise on copyright issues.

3. Schools should recognize that every created work, including school assignments, is an original work, and should respect the copyright interests of students and faculty in the original works they create. Schools should not publish or profit from student or faculty work without permission of the creator.

4. The policy should establish clear standards for the use of copyrighted materials on the web.

F. Use of e-mail in litigation

Parties entrenched in litigation or facing potential litigation have an ongoing duty to preserve information they know may be relevant. E-mail creates a tremendous amount of potentially discoverable information in litigation.

In the discovery phase of litigation, one side digs for information from its opponent by asking written questions and requesting relevant documents. Attorneys are bound by ethics and law to turn over the requested information, even if it is incriminating or harmful to their case.

In modern litigation, attorneys frequently demand the production of potentially relevant e-mail and website information. Because of its informal nature, attorneys consider e-mail an excellent source of discovery and potential evidence for use at trial. Frequently, administrators and teachers make statements in e-mail that would not be placed into written memos or documents.

Employers can look for increased use of e-mail as primary evidence in sexual harassment and discrimination cases. In Knox v. Indiana, for example, a state employee sued for sexual harassment based

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[28] 17 U.S.C. § 110(1).

in large part on e-mail messages sent to her by her supervisor.[29] The supervisor's messages graphically propositioned the plaintiff for sex, and the plaintiff's investigator discovered those e-mails. The court affirmed a jury verdict for the employee based on her Title VII claims.[30] With the increased ability to attach pornographic images to e-mail messages, employers are seeing more sexual harassment suits by employees who are exposed to the display of pornographic or other offensive material.

1. Discovery of Electronic Communications

E-mail messages are now as easily discoverable as paper messages have always been. Federal discovery rules provide that the word "document" includes electronic "data compilations,"[31] and courts interpreting the Federal Rules of Civil Procedure have held that e-mails are subject to the same discovery rules as documents.[32] Courts have also punished employers for deleting e-mails, after the initiation of litigation, that might have been useful to the adverse party at trial.[33]

To prevent the use of e-mail technology in ways that could be adverse to school districts in litigation, districts should institute e-mail use policies and uniformly enforce e-mail use restrictions. First, a policy prohibiting or severely limiting personal use of e-mail should be implemented to deter improper use and help shield districts from liability relating to such use.

Second, school district should develop a policy regarding preservation of e-mail files. Some government agencies do not back-up e-mails at all to avoid inadvertent retention problems. Whatever a school district's policy, it should be adhered to at all times, including upon request for discovery of e-mails. If a district's policy is to delete e-mail files every month, it may not deviate from that policy to defeat discovery by deleting every week. Moreover, once a discovery request has been made, school districts have a duty to refrain from deleting e-mails even if it would normally do so under its own policy. Having a fairly short time frame for e-mail retention is advisable in terms of discovery or liability. E-mail users can be encouraged to print out and save paper copies of documents important to them. Information of great significance is then committed to paper or recalled through the memory of witnesses.

Courts have not extended a sympathetic ear to arguments of undue expense and burden in the context of discovery and demand for e-mail production. In some cases, litigants have been able to obtain an opponent's entire hard drive, computer, or even network server. School systems should understand that simply deleting an e-mail does not necessarily erase it from the computer's memory. Technology based investigators may be hired to analyze entire computer systems, copy and search for information and in some cases even re-create deleted information. Thus, having a policy and a systematic way of proceeding on such matters avoids the potentially cumbersome and expensive process of turning over voluminous amounts of data or searching for a specific e-mail on demand. In one Ohio case, a federal district court refused to grant relief to a plaintiff who asserted that a discovery request of electronic information would require a search of 2.8 million documents, cost more than $80,000 and require hundreds of hours of work.

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[29] 93 F.3d 1327 (7th Cir. 1996).

[30] See also Vicarelli v. Business Int'l Inc., 973 F. Supp. 241 (D. Mass. 1997)

[31] The Federal Rules of Civil Procedure provide that documents include "writings, drawings, graphs, charts, photographs, phone records and other *data compilations* from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form. . ." Fed. R. Civ. P. 34(a).

[32] See e.g., In re Brand Name Prescription Drugs Antitrust Litigation, 1995 U.S. Dist. LEXIS 18048 (N.D. Ill. 1995) (unpublished disposition).

[33] See Procter & Gamble v. Haugen, 179 F.R.D. 622 (D. Utah 1998).

The court held the request for relevant documents was reasonable and the burden was the result of the party's own unwieldy record-keeping system. Further, the court noted that when a party chooses electronic storage for information, the need for retrieval is an ordinary and foreseeable risk.

The duty imposed on entities to preserve e-mail was illustrated in a case involving Procter & Gamble (P&G) and Amway-- fierce competitors in the personal care and home care market.[34] In the midst of a lawsuit, Amway served P&G with broad discovery requests demanding access to e-mail correspondence. P&G failed to retain its e-mail files after Amway's discovery request and the court held that P&G's routine practice of continuing to purge its e-mail was a violation of the federal rules of discovery. The court found that P&G was on notice of its duty to preserve the date and sanctioned Amway $10,000.

2. Tips for preparing for e-mail discovery in litigation

1. Create and enforce an electronic document policy that minimizes the amount of time information is stored.

2. Enforce the policy in a uniform way. Do not deviate when faced with litigation or potential litigation, except to preserve data when served within a valid document request.

3. When working with a school attorney, create a litigation response that includes a process for preserving relevant data at the outset of litigation.

4. Do a litigation risk assessment that identifies weaknesses and strengths and potential high-cost areas.

5. Educate employees and emphasize the need for a business approach to e-mail communications.

6. For safety's sake, both the attorney and client should assume that their e-mail could be produced in discovery. Thus, unusually sensitive communications should not take place via this medium.

3. Security Issues

Because the attorney-client privilege is based in part on the expectation of privacy in communications, the increasing use of technology raises concerns about privileged communications. Generally, the attorney-client privilege extends to (1) a communication from a client (2) to the client's lawyer or the lawyer's agent (3) relating to the lawyer's rendering of legal advice (4) made with the expectation of confidentiality and (5) not in furtherance of a future crime or tort, provided the privilege has not been waived.

The fourth element, an expectation of confidentiality, has particular relevance to e-mail correspondence. If the client does not treat the information as confidential, the client will not have an expectation of privacy and the privilege may never arise. In Bowne, Inc. v. AmBase Corp, the court held that the disclosure of attorney confidences to corporate employees for purposes unrelated to the obtaining of legal services from the corporation's attorneys vitiates the privilege.[35] It warned, "[i]f a corporation wants to enjoy the benefits of the privilege it should enforce a fairly firm 'need to know' [policy] of the

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[34] Id.

[35] 150 F.R.D. 465, 491 (S.D.N.Y. 1993).

communication rule.[36] In other words, forwarding e-mail messages to unnecessary recipients can destroy the confidentiality element needed to maintain the privilege.

4. Impact of Unsecured Technology On The Attorney-Client Privilege

When communications occur in circumstances where others can easily overhear, there is no expectation of confidentiality. The advent of technology that can be intercepted easily broadens the possibility of waiver of the privilege. For example, a cordless telephone is a two-way radio transmitter/receiver. Anyone within 1,000 feet who is listening with a scanner, compatible cordless telephone or other radio receiver may intercept the conversation. Although it is a violation of federal and state law to intercept cellular telephone conversations, an Illinois court has held that persons using such phones do not have an expectation of confidentiality.[37]

Similarly, e-mail communications via the Internet may not enjoy the privacy protections one expects from an employer-operated e-mail system. Unlike private e-mail systems, the sender of an Internet e-mail message has no control over the routing, storage or access to the message either in transit or at the receiving address. Although little case law exists on the subject, courts may refuse to find an expectation of privacy in e-mail sent over the Internet.

Attorney bar groups in several states have issued advisory opinions on this issue. The prevailing approach of these opinions is that unencrypted e-mail to attorneys on routine matters carries with it the assurances of confidentiality, but highly sensitive matters require enhanced security. In an opinion released February 12, 1998, the District of Columbia Bar Legal Ethics Committee determined that except in extraordinary circumstances, unencrypted e-mail is an acceptable form of conveying client confidences, even where the lawyer does not obtain prior consent from the client. In addition, a 1998 law in New York state added to the Civil Practice Law and Rules to ensure no attorney-client communication would lose its privileged status solely by virtue of being communicated by electronic means.

Keep in mind that these same general principles that are considerations for dealings with outside counsel are equally applicable to communications that flow through the in-house school district legal department.

5. Precautions

As a precaution to the waiver of attorney-client privileged information, school districts should inform administrators about the rules surrounding the expectation of confidentiality. Armed with legal rules, administrators will be better able to take the practical precautions necessary when communicating with counsel. School districts also may wish to consider the use of encryption technology. Encryption is a method of scrambling electronic mail messages at their source so that anyone who intercepts messages will be unable to read them. The intended recipient of the messages will have a corresponding decryption utility that renders the messages readable. Commercial and shareware encryption utilities are readily available.

II. EQUAL E-ACCESS FOR INDIVIDUALS WITH DISABILITIES

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[36] See also Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 696 (E.D. Va. 1987). This court held that the defendant's failure to indicate on the fact of the memorandum that the document was confidential or contained attorney-client privileged information, coupled with the fact that the memorandum was distributed to six (6) employees, gave the court serious doubt as to whether the party met its burden of demonstrating that the document was intended to be confidential.

[37] People v. Wilson, 196 Ill. App. 3d 997, 1010 (1990) appeal denied, 133 Ill.2d 571 (1990); see also Illinois Attorney General's Opinion, 1994 Ill. AG LEXIS 10.

More than 54 million Americans experience some limitation on their activities as a result of chronic health problems. Thanks to public health successes in preventing premature death and improved medical and assistive technology, this prevalence of limitations on activity will likely increase by about 50% by the year 2010 due to increased survival and life expectancy among the very young and aging population.[38]

Of those people, more than 4.6 million are children or adolescents, comprising 8.5% percent of the population under age 15.[39]

The disabled are encountering a growing number of access barriers, such as inaccessible websites, software incompatibility with adaptive devices, and voice automated systems inaccessible to adaptive telephones.

The greatest barriers affect access by visually impaired and mobility impaired individuals. Mobility impairments can be caused by arthritis, stroke, cerebral palsy, Parkinson's disease, multiple sclerosis, loss of limb, paraplegia, repetitive stress injury, and others. Imagine using the Net without a mouse. This is what a mobility-impaired person might have to do. Imagine surfing the web with your monitor turned off. This is what a blind person experiences. The blind user cannot see animation, colors, graphics or text layout, and visually oriented input systems (e.g. mouse) are useless. With increased power of technology we are enjoying audio and video-streaming. How will the deaf user "hear" the audio message? Do we want to make our information available to all of our users?

In addition, a growing number of people are using mobile computing systems (eyes and hands-free), or surfing the web on their cell-phones, web pagers, or other nongraphical devices. Non-graphical products have been developed such as AT&T's Digital PocketNet, AvantGo, NuroMedia, OminSky, Palm, PeanutPress, SoftBook Press, and web-enabled mobile phones.

Web accessibility means that any and all persons, regardless of their ability, can access your site, understand the information on it and interact with it.

A. Why Should Schools' Websites be Accessible?

1. The Pragmatic Reasons For Making Websites Accessible

a. The web can be an incredibly liberating tool for disabled people. They can enjoy access to information, news, shopping, electronic bill paying, participation in government at every level, and other such fulfilling activities at levels never before imagined. But thoughtless design of a website can turn into the equivalent of a wonderful library without any doors. You cannot get inside, and even if you could, you could not move from room to room and enjoy the information treats that are stored there.

b. Schools should be on the cutting edge of accessibility to technology. We have the teachers, the web designers, the assistive technology to create the doors to the virtual library and to ensure that the layout and access is as simple, logical and "user-friendly" to the disabled as to the non-disabled.

c. School websites serve several audiences and several functions. For students, school closing information is available during inclement weather. Homework assignments are posted when school is closed, or for those students who are home sick. Links to appropriate educational or research sites aid in

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[38] Official website for National Center on Birth Defects and Developmental Disabilities. http://www.cdc.gov/ncbddd/dh/.

[39] United States Census Bureau, American with Disabilities, 1997 (the latest statistic available).

homework preparation and general knowledge. Sports scores, schedule changes, student artwork and writing, and school promotional information is readily available.

For parents, the benefits listed above and more are available. Information about the school, the calendar, school activities, policies and procedures, student achievements, community events, and political activities affecting the schools or the community in general might be accessed. Parents can communicate electronically with teachers and administrators through the web. Audio and visual information can enhance the presentation of information and the school's image.

Employees need similar information. Schedules and schedule changes; posting homework and assignments; displaying student work and achievements; accessing policies and procedures are but some of the needs faculty and administration may have.

The general community may rely on the school website as both a source of information and a portal. Political, financial and policy information might be accessed. Student work and achievements can be advertised and promoted. Sports schedules and outcomes, game and individual statistics, and district and regional news is often attractive to sports fans. Links to local and state government sites, to educational sites, or to other information sites can be a very useful service to the community.

But all of this information must be accessible if it is to be useable. A person in a wheelchair cannot use a wide, flat sidewalk if a curb-cut does not allow her to leave the street and access the sidewalk. Likewise, virtual curb-cuts are needed by the disabled if they are to enjoy the many benefits of your website.

d. Proponents of accessible web pages assert that in fact, making your website more accessible to the disabled actually improves the website for the general user. The HTML code will be cleaner and more professional. Search engines only search text, not images and graphics, so improving your text for the visually impaired, or providing transcripts of audio for the hearing impaired, will enable search engines to index your site more easily.

e. Finally, there are political realities to consider. If the disability advocates in your area are organized and vocal, they may start assessing local government websites for ease of use and accessibility. It is far better to be pro-active and prepared for such a challenge than to be reactive and subject to a "gotcha" response from those whose interests may not always be perfectly aligned with yours.

2. The Legal Reasons For Making Websites Accessible

a. Americans with Disabilities Act.

To protect those with disabilities, Congress passed the Americans with Disabilities Act (ADA) in 1990. The ADA prohibits discrimination on the basis of disability in areas of employment, programs and services provided by state and local governments, goods and services provided by private companies, and in commercial facilities. The ADA also requires state and local governments to provide access to programs offered to the public. It covers effective communication with people who have disabilities and requires reasonable modifications of policies and practices that may tend to discriminate against the disabled.

As government entities providing programs and services, public schools are covered by the Americans with Disabilities Act and must comply with its provisions.[40] Schools must provide effective communication to individuals with disabilities, and covered entities that use the Internet to provide

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[40] The Supreme Court has determined that the Eleventh Amendment to the Constitution bars damage actions against states and state agencies under the ADA, but compliance and injunctive remedies are still available. Board of Trustees v. Garrett, 2001 U.S. LEXIS 1700 (Feb. 21, 2001).

information regarding their programs, goods or services must be prepared to offer those communications through accessible means. Such entities may provide web page information in text format that is accessible to screen reading devices that are used by people with visual impairments, and they may also offer alternative accessible formats that are identified in a screen-readable format on a web page. Covered entities include state and local governments and places of public accommodation. Id.

Even if a school library or computer lab terminal has assistive technology installed for students with disabilities, Internet research by students with disabilities is not possible with inaccessible web page design.[41] The issue is not whether the student with a disability is provided access, but the issue is rather the extent to which the communication is actually as effective as that provided to others.[42]

"Effective communication" is defined by the Office of Civil Rights ("OCR") in reference to three fundamental components:

1. timeliness of delivery
2. accuracy of the translation
3. provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.[43]

An entity is in violation of the ADA, according to OCR, if it responds on an ad hoc basis to complaints. OCR opines that there is an affirmative duty to develop a comprehensive policy in advance of any request for auxiliary aids or services.[44] In addition, the disabled community must be consulted in the development of the policy.[45]

Advocacy groups are beginning to take enforcement actions on behalf of the disabled to attack access barriers in web technology. The National Federation of the Blind sued AOL in 1999 charging its browser and website were inaccessible to the blind. The case was settled on the 10th anniversary of the ADA with AOL promising to bring its browser and website into compliance with the ADA within one year. In March 2000 the Bank of America and the California Council of the Blind entered into a settlement agreement pursuant to which Bank of America agreed to install 2500 talking ATM's in Florida and California, and to ensure that its Internet banking services were accessible to users employing screenreaders. Later in 2000 the Connecticut Attorney General, the National Federation of the Blind, and four online tax filing services entered into a settlement whereby the tax filing services agreed to make their websites accessible to the blind for the 2000 tax filing season.

b. Rehabilitation Act Amendments of 1998.

The Rehabilitation Act Amendments of 1998, P.L. 105-220, expanded the technology access requirements of Section 508 of the Rehabilitation Act of 1973. Although directed primarily at federal agencies, it also regulates states and state agencies receiving federal funds under the Assistive Technology

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[41] U.S. Department of Education, Office of Civil Rights Settlement Letters: Docket Number 09-95-2206 & 09-27-2002.

[42] Id., citing 28 C.F.R. § 35.160(a).

[43] Id.

[44] Id.

[45] See Tyler v. City of Manhattan, 857 F. Supp. 800 (D. Kan. 1994).

Act of 1998. Local governmental entities may be affected, especially in states with statutory prohibitions on disability discrimination by entities receiving state funds.

Essentially, the Rehabilitation Act adopts the same guidelines for information technology accessibility standards as the ADA. Further, long-standing §501 and §504 accommodations for individuals with disabilities must be continued.

Section 508 of the Rehabilitation Act has been interpreted by the U.S. Department of Justice to require an accessibility plan and policy for information technology that takes into account the needs of all end-users, including people with disabilities. These issues cannot be addressed on an "as-needed" basis.[46] The U.S. Access Board has developed technical and functional performance criteria that will determine if a product or system is "accessible." The Federal Acquisition Regulation Council published the guidelines in the Federal Register on April 25, 2001. To view the regulations and to track their progress, log on to http://www.section508.gov/index.html.

Many states have statutes protecting the rights of the disabled. Because of the broad range of constituencies using school websites, many of these statutes could apply to accessibility issues. Disability in employment statutes could give staff and faculty access rights to the website. Public disability statutes could give rights to members of the general community. Of course, students could assert rights under the IDEA or under various state laws. What school officials must recognize is that once one person has access rights, the website must be brought in conformance to best practices which would satisfy the needs of any of the constituencies.

B. How to Make a Website Accessible.

The first step is to understand the purpose for the web. The web is not a "visual medium"; it is an "information" medium. Do not confuse the display of the page with the actual page itself.

The most common issues that arise relate to the visually, hearing or mobility impaired. A blind, visually impaired or dyslexic student might employ a screen reader that would read the text to her. If she was going on-line to obtain her English Composition homework, she would likely hear the following from her reader:

> "[image],
> [image],.../syl/info/info.html,.../wkgps/ctlg.html,.../asmt/asmt.html,...on line/crs.html."

If the webmaster or designer made a few simple accommodations, the student would hear what the other students see:

> "Welcome to English Composition 12. Please select from the following menu items: syllabus, workgroups, assessment, online submissions."

The problem is that many web designers have no clue how to design for a blind web surfer. They do not know how their pages "look" if you can't see graphics.

Likewise, if a deaf student logged onto a website with audio files, he would not be able to hear them. Audiovisual files would give him the visual image, but again there would be essentially silence

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[46] See April 2000 report of the U.S. Attorney General, "Information Technology and People with Disabilities: The Current State of Federal Accessibility," at p. 7.

rendering the access both meaningless and frustrating. Simply by captioning or providing a transcript, the hearing impaired student could read the information others hear.

There are many things that can be done to make websites accessible to the disabled. Some of the more obvious and essential are listed below. At the end of this outline is a list of useful websites dedicated to providing much more detailed information. Also as discussed below, software exists that can "test" and "certify" that a website is functionally accessible to a reasonable standard.

1. **Prioritize**. Start with your homepage. Then redesign your high-traffic pages. Then focus on essential critical paths such as school closing and emergency pages, homework pages, etc. Roll out each page as it is ready.

2. **Check for accessibility**. Use both accessibility software and actual test users to determine if you have satisfied your goal of accessibility.

3. **Develop a disability workgroup**. Don't assume you can figure out what works or does not work for disabled users in every event. Have a committee of disabled users advise you and test for you. Such a committee can also provide an excellent degree of protection from liability if you receive a legal challenge or a phone call from OCR or DOJ.

4. **Images and animations**. Recognize that visuals and images are useless to the visually impaired. The "alt" attribute can be used to describe the function of all visuals. The more important the image, the more descriptive the alt tag should be. For a good example, connect to MSNBC's website. They use images to attract you to breaking news stories, but if you put your mouse on the image, it will open a text box that is like a long, descriptive headline. A blind user's reader would read out loud the text box so the user could decide if he wanted to go to the story. Avoid scrolling marquees.

5. **Multimedia**. This mode of communication is becoming easier and more popular, and it looks great. But keep in mind that your deaf users need captions and transcripts to replace audio information.

6. **Hypertext links**. Do not simply use the phrase "click here" when you are providing a link. Instead, use a short textual description that tells the reader what the link is to.

7. **Page organization**. This can be very important, especially to the visually impaired user. Use headings, lists, and a consistent structure. Break up long lists into shorter sublists with appropriate headings or labels. Use Cascading Style Sheets (CSS) for layout and style. A site map in place of a search engine can assist the blind or dyslexic user greatly.

8. **Frames**. Think these through. Do you need them? If so, consider a text-only version of your site a user can go to. Does your site still make sense with the graphics off? Do you have more tables and columns than you need? Do you have documents posted in PDF (portable document format)? Most screenwriters cannot currently read PDF documents, so if you have them consider posting an HTML version as well. Voice command software cannot activate a drop-down java menu. Again, a text-only page solves this problem.

9. **Charts, graphs and tables**. Tables and graphs can create a major problem for the visually impaired. If you need them, summarize or use the LONGDESC attribute to provide an adequate description. With tables, make line-by-line reading sensible. Summarize for clarity. Avoid using tables for column layouts.

10. **Check your work**. View your current site, and then later your "new, improved" site, with a text-based Internet browser. There are no graphics, no fancy fonts, just old-fashioned text-on-a-screen. You can download a Windows 95/NT version of Lynx for free at http://www.fdisk.com/doslynx/lynxport.htm. Download the zip file, unzip it into the desired directory on your computer, and visit your school's website. Are all of the links visible? Or does your website say

"[image][image]"? That is what the blind visitor will hear. If so, add alt-tags to your HTML coding. (See 4 above). Do the same thing with frames, charts, graphs, etc.

11. **Validate your work**. The most popular online accessibility validation tool appears to be "Bobby," which can be found at www.cast.org/bobby. Bobby is a free service provided by CAST to help Web page authors identify and repair significant barriers to access by individuals with disabilities.[47] It will help web page authors identify necessary changes to their pages so users with disabilities can more easily use their web pages. For example, a blind user will be aided by adding a sound track to a movie, and a written transcript of a sound file on a web page will aid a hard-of-hearing user. Bobby will recommend that these features be added if they do not already exist.

There are other organizations and services as well, and more will come in response to the new regulations.

III. E-BOARD MEETINGS AND OPEN MEETINGS LAWS

A. Open Meetings Laws

With the rapid advancement in the technology of electronic communications has come the need for state legislatures to revise their Open Meetings Laws. These laws (commonly referred to as Sunshine Laws) generally require that meetings of school boards and other public bodies be conducted openly, so all interested persons are permitted to attend and listen to deliberations and proceedings. The policy behind these laws is the assurance that the public has access to information concerning the way the government conducts the public's business. Laws differ from one state to another.

Generally, an actual meeting is required before the open meeting requirements are triggered. A "meeting" generally occurs if a quorum of the public board meets and discusses public business. Three members of a five-member school board appearing simultaneously at a school function or event is generally not a meeting because business is not being conducted. Those same three members may run into one another at a local restaurant and sit down for a cup of coffee. So long as they avoid public matters, their time together is not a "meeting" as defined by most sunshine laws.

If a quorum meets accidentally, but starts to talk about public business, a "meeting" has occurred. If the three get together on a teleconference and discuss a school matter, a meeting has occurred. But what happens when one school board member e-mails another on a school matter? What happens when the receiver adds a comment and forwards the two messages to a third member? What happens when the third adds a response and forwards it to the whole board? What if the board has set up a listserv so that all of the emails are sent simultaneously in the first instance? What about a "chat room"? These are difficult questions and as school boards use more technology it is important that they understand the issues and answers.

B. Freedom of Information Act.

Public documents generally are subject to distribution to the press and the general public pursuant to state Freed of Information Act ("FOIA") laws. An e-mail is simply an electronic document. Are school board members required to save and store e-mails on business issues for future disclosure? Can they store them electronically or must they be in hard copy? Must the data be stored at the school board office? What if the school board member is using the school system's computer and also sends an e-mail to her husband on a private matter–is it subject to disclosure because it was sent on a school-owned computer? Will the

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[47] Founded in 1984 as the Center for Applied Science Technology, CAST is an education, not-for-profit organization that uses technology to expand opportunities for all people, including those with disabilities.

school system's acceptable use policy forbidding personal use of school computers affect the answer to the preceding question?

Electronic transmission of information is expanding in an incredibly exponential fashion, and state legislatures and courts have not been able to keep up. The answers to these questions are not always clear. However, the logic of FOIA laws can be applied to make some predictions as to how courts would likely answer these questions.

1. E-board meetings

a. What is a "meeting"?

Open meeting laws require that there be an actual meeting of a majority (quorum) of a board or council to discuss business matters. The meeting can be in person or telephonic, but simultaneous communication is required. Some states, such as Virginia, expressly prohibit telephonic meetings unless a quorum of the public body is actually physically assembled at a published location, and the physical and telephonic communications are available to the public.

An examination of several state statutes demonstrates the diversity of definitions of "meeting":

In 1994, **California** amended its Sunshine Law, the Brown Act, to define "meeting" as "any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members..." Cal. Govt. Code Ann. §54952.2 (West, 1998).

In **Montana** the term "meeting" is defined as "the convening of a quorum...whether corporal or by means of electronic equipment to hear, discuss or act upon a matter...." Mont. Code Ann. §2-3-202 (West, 1997).

Colorado defines "meeting" as "any kind of gathering convened to discuss public business, in person, by telephone, electronically, or by other means of communication." Col. Rev. Stat. Ann. §24-6-402 (West, 1998).

The Freedom of Information Act in **Virginia** provides that any governing body conducting a meeting where the "public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically present" violates the law. 1950 Va. Code Ann. §2.1-343.1 (as amended) (Michie, 1998).

A 1998 Florida Attorney General opinion concluded that because **Florida** law required school boards to meet at "a public place in the county," a quorum of the school board must be physically present. The board, however, could use electronic means to enable a minority of members who were absent to be included.

In **Washington**, the Open Public Meetings Act of 1971 defines "meeting" as "meetings at which action is taken." RCW 42.30.020(4). The definition of "action," is defined as "the transaction of the official business ... by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions," and could encompass various means of communication. RCW 42.30.020(3).

b. When is a meeting "convened"?

Generally, a single e-mail from one board member to another on a matter of school business does not trigger the open meeting requirements of notice and public access. However, when that e-mail is forwarded to a third board member with comment, especially if three constitutes a quorum, the e-mail could violate open meeting laws.

A listserv allows simultaneous communication with several or all of the board members simultaneously. It is not difficult to appreciate that use of a listserv to discuss public business out of the public eye violates at least the spirit, if not the letter, of open meeting statutes.

Groupware Live, interactive technology is now generally available. Referred to as "groupware," it creates the equivalent of a limited access "chat room." Touted as able to improve the efficiency of meetings and the flow of information in organizations, it allows long distance meetings at very low cost.

Lotus Development Corp. produces Lotus Notes® and Domino® as groupware products with a large market niche in both public schools and the corporate arena. Microsoft's Exchange®, and Novell's Groupwise®, are strong challengers. As more organizations create intranets, networks of significant data and collaborative capability are increasingly available.

Any business communication among a majority of board members transmitted via a chat room, groupware, intranet, listserv or similar media is likely to be viewed by a court as a meeting subject to open meeting requirements.

2. Opinions and Cases

a. Application of the Law

A 1995 Kansas Attorney General's opinion found school board members in probable violation of that state's Sunshine Law if a quorum of "board members simultaneously engage[s] in discussion of the board business through computer terminals."[48] This opinion was based upon the Kansas statute, which defines "meeting" to include any "gathering, assembly, telephone call or any other means of *interactive communication*." K.S.A. 75-4317(a). However, the attorney general opined that if "a sender of a message does not get an immediate response from a receiver, the communication is not *interactive*." Simply sending a message to other board members would not constitute an "*interactive communication*" as defined by law.[49]

The Kansas Attorney General revised the opinion in 1998, declaring that a series of meetings, each of which involves less than a majority of a quorum, but collectively totaling a majority of a quorum, at which there is a common topic of discussion of the business or affairs of that body, constitutes a meeting for purposes of the Kansas Open Meeting Act.[50] An example would be a communication tree in which the Chair e-mails board members one-by-one and asks their opinion on a controversial subject. Although no more than two board members would be "speaking" to each other at a time, the survey or poll would violate the Sunshine Laws.

Similarly, the Kansas AG said, if one board member e-mails another, who, in turn, adds to the e-mail and forwards it to another, that would violate the law. The same would be true of a group mailing list (listserv) in which each member automatically receives and can comment on messages posted by others. The obvious problem is that members could exchange their thoughts on an issue, and even develop a consensus, without ever gathering or communicating in real time.

The Kansas opinion is somewhat similar to Del Papa v. Board of Regents of the University and Community College System of Nevada.[51] In Del Papa, the Nevada Supreme Court held that "a quorum of a

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48 Kan. Atty. Gen. Op. No. 95-13.

49 Id.

50 Kan. Atty. Gen. Op. No. 98-26.

51 956 P.2d 770 (Nev. 1998).

public body using serial communication to deliberate toward a decision ... on any matter over which the public body has supervision" violates the state's Sunshine Law.[52] In that case, the chairman of the school board sent faxes to board members requesting their opinions about whether to issue a media statement condemning public criticism of school board activities by one of its members. All board members received faxes except the member who had made the public criticisms. The board members responded to the chairman's inquiry by telephone, and the chairman ultimately decided not to issue the media statement.

In finding the school board violated the state Sunshine Law by using telephones and faxes to transact school board business, the court based its analysis on the definition of "meeting." The court also relied on case law in other jurisdictions holding that the making of decisions by public bodies using either telephone or mail polls without public attendance constitutes a meeting and therefore violates the spirit of the state's Sunshine Law. Finally, the court relied on a provision in the state code declaring that "electronic communication ... must not be used to circumvent the spirit or letter of the [Sunshine Law]."[53]

The National Association of Counties, in its online publication *Online County News*, reported on a Sarasota County, Florida case where a majority of county commissioners agreed by e-mail to sell a proposed library site to a private developer, but to withhold a public vote until a public election a few months later. A lawsuit turned up the e-mails of the secret arrangement, but the suit was dropped when the newly elected commissioners made the same decision as the old ones.[54]

The "quorum" issue was explored in a Missouri case in 1996.[55] An appellate court ruled that school board members did not violate the law when they held a series of one-on-one conversations in person and by telephone to discuss renewing the superintendent's contract. It was significant to the court that less than a quorum of the board participated in the conversations.

However, the court warned that it was "not so naive as to be blind to the fact that those inclined to violate the Open-Meeting Laws could do so by using the quorum requirement as a shield. This could be done by conducting, in effect, the equivalent of a "public meeting" in a series of "closed meetings" with numbers of less than a quorum in each such meeting.[56] If the board then met to "ratify publicly that which had already been done in private," the spirit of the Sunshine Law would be violated.[57] The logic of Colombo was affirmed by the Eighth Circuit in Hanten v. School Dist. of Riverview Gardens.[58]

In Wood v. Battle Ground School District, a 2001 case, the Court of Appeals of Washington held that "in light of the [Act's] broad definition of "meeting" and its broad purpose ... the exchange of e-mails can constitute a meeting."[59]

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52 Id. at 778.

53 Id. at 773.

54 *Online County News*, Vol. 29, No. 21, Nov. 10, 1997.

55 Colombo v. Buford, 935 S.W.2d 690 (Mo. Ct. App. 1996).

56 Id. at 699, citing David Ranken, Jr. Technical Inst. v. Boykins, 816 S.W.2d 189, 192 (Mo. 1991).

57 Id.

58 183 F.3d 799 (8th Cir. 1999).

59 29 P.3d 1208 (Wash. App. Div. 2001).

b. Practical Considerations

1. School board members must be well-informed as to their legal responsibilities when using electronic communications. They must understand their state's Open Meeting Laws and appreciate when an e-mail, fax, or phone conversation may trigger those laws. They must be committed to the spirit of the law, which is conducting public business in an open and responsive manner. Further, the remedy for violation of Sunshine Laws generally is nullification of the underlying action, which could seriously undermine a school board's intent.

2. E-mails and faxes to other board members by themselves generally do not implicate Open Meeting Laws. The mere exchange of ideas and information between two board members is not the conduct of public business, because they do not involve the deliberative process that Sunshine Laws demand be available to public scrutiny.

3. Simultaneous or serial communications may implicate Open Meeting Laws. These communications begin to form the give-and-take that characterizes the deliberative process, and should be done in an open forum. Public business usually includes the adoption of any proposed policy, resolution, rule or other formal action, and any deliberative activities regarding those matters.

4. E-meetings often can allow absent board members to participate in important public issues, which is beneficial to the representative nature of board work. Generally, however, there should be a quorum present at a physical location where the press and public are present, and the press and public should have the same access to the electronic input as the board members. This can be accomplished by speaker phones for telephonic meetings, or with projectors or large screens for computer-based information or communication.

c. Freedom of Information Act Considerations

State Sunshine Laws, Public Records Acts, and Freedom of Information Acts require public access to certain records. Although statutes vary widely, they generally require that records documenting policies, decisions, procedures and other operations of public offices be made available to the public.

Are e-mail records public records for purposes of state law? Should they be archived as is required of other documents? How well are public agents equipped to act as official custodians of such communications and to determine whether or not they are public records?

Some states, such as Colorado have attempted to specifically address these issues in their Sunshine Laws.[60] For instance, Colorado law provides that only e-mail used "to discuss pending legislation or other public business" is subject to the Sunshine Law, and e-mail covering other topics is not. Even this leaves significant areas open to interpretation by courts.

E-mail is a useful tool for school officials to gather information and communicate with staff, other officials, agencies and the public. But school officials must be alert that any such communication may be subject to a FOIA request.

Acceptable use policies applicable to board members as well as staff are critical to managing the risks in this area. But enforcement can be problematic. If the locality has an acceptable use policy stating that its computers and/or e-mail systems shall only be used for school, not personal, use, how can the school system later argue that any e-mail, no matter how sensitive, is not on a matter of public business?

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[60] Colorado Stat. Ann. § 24-6-402.2(d)(III).

"No personal business" policies have some appeal, but can create potential problems. Just as no school system would prohibit teachers from taking a phone call from a spouse, likewise expecting people never to send or receive personal e-mail is simply unrealistic. And if the school system ignores minor violations of a "no personal business" policy, how can it then terminate someone who uses the e-mail to send unionizing messages or to advertise union activities? Consistency becomes a critical issue.

What happens when a board member sends an e-mail on his personal computer on a matter of school business to another board member on her personal computer? The school board has no archived record of the message, but is it not subject to a FOIA request if it falls within the state's document retention guidelines? The board members may be liable for not archiving or copying to an official location the electronic document.

d. Practical Considerations

1. Develop an acceptable use policy applicable to all users, including school board members that is reasonable and enforceable. Then enforce it consistently.

2. Treat all electronic communications as potentially subject to FOIA. Do not put anything in an e-mail you would not want to read in the newspaper.

3. Board members would be well advised to keep public and personal communication totally separate. Do not put personal messages in e-mails discussing public business. Do not send or receive personal e-mails on school computers unless you do not care about eventual disclosure.

4. Archive all e-mail discussing school business in the same manner as you archive physical documents. Store backup discs or drives for the statutorily prescribed time period.

5. When responding to FOIA requests, if in doubt consider two factors: 1) the source of the message and, 2) the content of the message. If the source is a personal computer and the content does not relate to school business, the message is protected as being not a public record. If the e-mail is sent or received on a school computer and relates to school business, clearly it is subject to disclosure. Where only one factor is present, content is more heavily weighed than the method of transmission and receipt, but remember to consider the "no personal business" policy if you are arguing against disclosure.[61]

6. Know your state laws. In Virginia, it is a violation of the state's FOIA laws for a local governing body to send electronic mail communications to one another that constitute official action. Va Code §2.1-343.1(A). Official business must be conducted in a meeting where the membership is "physically assembled." This does not preclude e-mail messages, but limits the extent to which polls or surveys or even responses can be employed.

The Florida Attorney General has issued an opinion that an e-mail transmission is a public record if it is issued in connection with official business, and must be retained by the district and produced upon request. California law allows e-mail records to be archived on a school database or printed and saved as hard copies, but makes either subject to disclosure "in a form determined by the agency."

The varying conclusions in these decisions illustrate the disparity among state laws in this area. A survey of state Sunshine Laws suggests some states still operate under old Sunshine Laws and make no mention of electronic communications, while others have amended their statutes to include such provisions.

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[61] See State Ex Rel. Wilson-Simmons v. Lake County Sheriff's Department, 693 N.E.2d 789 (Ohio, 1998) (public nature of e-mail dependent on two factors, "subject mater" and "origin").

To determine whether board members have complied with a state's Sunshine Law, courts will also review the substance of the communication that occurred. Once again, the determination depends on the language of the statute at issue, but most statutes prohibit private communications among board members only where "public business" is being transacted. Public business usually includes the adoption of any proposed policy, resolution, rule or other formal action.[62] It might also include deliberations on those same matters.

These materials demonstrate that as technological communications continue to advance, school board members will have to adjust their behavior. In some jurisdictions, individual e-mail communication among board members may not violate state law, while in others it may be a clear violation. Other forms of interactive communication (such as virtual conferencing, chat rooms and instant messaging systems) accentuate the need for school board members to recognize the implications of all forms of board communication. Members should be familiar with state laws governing such communications, and where uncertainty exists they should seek the advice of counsel. Since most statutes provide for the nullification of board decisions that violate state Sunshine Laws, school board members would be well advised to take preemptive action to determine what types of communication are implicated by law.

IV. E-RATE

Access to the Internet is one of the most important aspects of a technology system. While computers and software provide valuable tools for learning, it is the Internet that opens the door to the unlimited world of online information. But as with technologies, schools must pay for access to the Internet.

The Communications Act of 1934, which created the Federal Communications Commission (FCC), first codified the FCC's goal as: "To make available, so far as possible, to all the people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." The Telecommunications Act of 1996 reaffirmed this goal by establishing policies for the "preservation and advancement of Universal Service." In the Telecommunications Act of 1996, Congress expanded the reach of the Universal Service Fund (USF) to provide support for rural health care providers, schools and libraries.

The USF is generated through contributions from all telecommunications companies in the United States, including local and long distance phone companies, wireless and paging companies and payphone providers. The Universal Service Administrative Company administers the USF under the direction of the FCC. Although consumers, including schools, benefit from the Universal Service Fund, only companies that provide telecommunications service may draw money directly out of the Universal Service Fund, which defrays the cost of delivering discounted service to consumers.

The USF, or "E-rate," is used to provide the nation's elementary and secondary schools and libraries with deep discounts (20 percent to 90 percent) for services such as basic telephone service, advanced telecommunications services, Internet services and internal connections. As of February 2001, $5.8 billion has been committed to E-rate applicants throughout the nation.

The amount of discount awarded each school is tied to the schools' location (rural or urban) and economic need as determined by the level of eligibility in federal free and reduced-price school lunch programs. The Schools and Libraries Division of the Universal Service Administrative Company was created to administer and manage the application and funding process.

As part of the application process, schools applying for the discounts must submit a budget and a technology plan that meets certain criteria. The plan must include the school's strategy for providing

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[62] See Col. Rev. Sat. Ann. § 24-6-0402.2(c)(West, 1998).

professional development and for purchasing necessary hardware and software. Approval of plans may be granted by certain state education agencies. Additionally, schools must conduct a technology inventory and assessment of the telecommunications services it already uses as well as those it intends to purchase.

While the discounts available will be helpful to schools in obtaining telecommunications services, the E-rate does not provide for the cost of items such as hardware and software. In addition, the application procedure has been criticized by some as complex and cumbersome. Nevertheless, funds are available annually and eligible schools should take advantage of the E-rate to complement the many tools necessary to implement a technology system.

As with all legislation, the components of the E-rate are subject to change. For the most current information about the E-rate, visit the following Websites:

Schools and Libraries Division, www.sl.universalservice.org.

ATT Website for E-rate support, http://www.att.com/erate or call ATT hotline for E-rate: 1-877-272-2544.

LearnNet, http://www.fcc.gov/learnet/.

U.S. Development of Education Technology Initiatives, http://www.ed.gov/Technology.

Report by Benton Foundation and EDC/Center for Children and Technology Examines Impact in Chicago, Cleveland, Detroit, Milwaukee, http://www.benton.org/e-rate.

V. PHYSICAL SECURITY OF TECHNOLOGICAL EQUIPMENT

Security has become a major concern as technology becomes more prevalent in schools. While the legal rules surrounding theft or damage to technological equipment are the same as for all other school property, administrators must take special precautions to protect their investment in such equipment. Policies must be instituted and followed to prevent theft, vandalism and misuse of equipment in both school and district level operations.

Equipment such as laptop computers and software is easily transportable and should be secured when not in use. To facilitate repair, newer computers are designed for easy removal of components (such as hard drives), however those components are easily stolen unless properly secured. Computers themselves can have lock-down capabilities that should be utilized, and security systems can be used so an alarm will sound if wires are cut. Network hubs and other equipment to which few people need access should be kept in separate, lockable facilities. Areas not open to the public will require less attention than those widely accessible. Like all other aspects of the implementation of a technology plan, schools should assess their current and future security needs prior to the installation of technological equipment.

RESOURCES

Helpful Websites

Accessibility:

The World Wide Web Consortium Web Accessibility Initiative Resources, http://w3.org/WAI

Bobby, a Website that will perform a free accessibility diagnostic and make suggestions, http://www.cast.org/bobby

Starling Access Services, a Website that provides tools for webmasters, http://www.starlingweb.com

More Than Screen Deep: Toward Every-Citizen Interfaces to the Nation's Information Infrastructure, Computer Science and Telecommunications Board, Commission on Physical Sciences, Mathematics, and Applications, National Research Council; National Academy Press 1997 Full text, http://www.nap.edu/books/0309063574/html/121.html

Cynthia D. Waddell, Applying the ADA to the Internet: A Web Accessibility Standard, http://www.rit.edu/~easi/law/weblaw1.html

Section 508.

Federal Acquisition Regulations; a Website designed to educate the public about accessibility requirements for acquisition of electronic and information technology. http://www.section 508.gov/index.html.

Acceptable Use Policies

Critiquing Acceptable Use Policies – by Dave Kinnaman, http://www.io.com/~kinnaman/aupessay.html

Sample AUPs at Rice University, http://www.rice.edu/armadillo/acceptable.html

Acceptable Use Policies of Internet Service Providers, http://www.jmls.edu/cyber/statutes/email/policies.html

Developing a School or District Acceptable Use Policy for Student and Staff Access to the Internet – by Clancy J. Wolf, Bremerto, Washington, gopher://inspire.ospi.wednet.edu:70/00/Accept_Use_Policies/IN_policies.text

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www.ala.org/washoff/dmguide.html.

THE IMPACT OF IDEA PROCEDURAL VIOLATIONS ON SPECIAL EDUCATION APPEALS

P. TYSON BENNETT
REESE AND CARNEY, LLP
170 JENNIFER ROAD, SUITE 245
ANNAPOLIS, MARYLAND 21401
(410) 573-2001

I. BACKGROUND

A. Federal law and regulations make clear that parents and students have important procedural rights which must be accommodated.

B. The Supreme Court has told us that "... Congress placed every bit as much emphasis upon compliance with procedures ... as it did upon the measurement of the resulting IEP against a substantive standard." Board of Education v. Rowley, 102 S.Ct. 3034, 3050 (1982).

C. Failure to comply with IDEA procedural requirements can rise to the level of a denial of a free appropriate public education.

1. Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985). A learning disabled student and his parents brought suit seeking reimbursement for education costs incurred by them. The district was found to have ignored numerous fundamental procedures, thereby failing to provide the student with a free appropriate public education.

2. Board of Education of Cabell County v. Dienelt, 843 F.2d 813 (4th Cir. 1988). Parents of a child with learning disabilities brought suit to recover costs of placement in a private institution. The Fourth Circuit found that the school district did not provide a multi-disciplinary review, conduct a placement meeting, or encourage parental participation. In light of these facts, the district did not provide the child with a FAPE.

3. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992). Parents brought an action to obtain reimbursement for private tutoring. The district was found to have developed an IEP without parental participation or any representative from the child's private school. The school "failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized education program ...." The court ordered reimbursement for tutoring services and found that the district failed to provide the child with a FAPE.

4. Smith v. Henson, 786 F. Supp. 43 (D.D.C. 1992). The school district decided to educate several LD children in a public school, although they had received instruction in a private school the previous year. The district notified the parents that they had 15 days to challenge the proposed change. The court held that the district violated the parents' procedural rights by imposing a 15-day time limit on filing for a hearing, and that the district should have participated in the development of the IEPs that were delivered in the private school.

D. The trend in judicial decisions now is to determine the nature and impact of the procedural violation.

1. Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990). The court refused to require the school district to reimburse the parents of an LD child for the cost of private tutoring. The parents had refused the services of a public tutor. The parents argued that the IEP did not include all required items, but the court held that the omission of specific items did not render the IEP invalid. Finding such a violation to be a denial of FAPE, according to the court, would "exalt form over substance."

2. Burke County Board of Education v. Denton, 895 F.2d 973 (4th Cir. 1990). Parents sought funding for in-home habilitative services for their 19-year old son, and contended that the district violated procedural notice requirements. The court found that the procedural failure did not cause the student to lose any educational opportunity, thus there was no denial of FAPE.

3. Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990). Parents contended that procedural defects were so severe as to make the IEP inappropriate. In its decision, the court noted that "procedural flaws do not automatically render an IEP legally defective." Before finding an IEP improper, procedural inadequacies must "compromise the pupil's right to an appropriate education or cause deprivation of educational benefits.

4. Livington v. DeSoto County School District, 782 F. Supp. 1173 (N.D. Miss. 1992). Parents contended that the school failed to provide proper written notice and failed to advise the parents of their right to a due process hearing. The parents were accompanied to the team meeting by a special education advocate. The district court held that, although there were procedural insufficiencies, it was clear that the parents were actively advised, involved and informed. To "fault the district for [these technicalities] would be to exalt form over substance."

5. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3rd Cir. 1993). Parents of an eight-year old argued that the school district violated the procedural requirements of IDEA when it failed to have the parents sign a revised IEP. The court found that, despite the error, the parents did have "an opportunity to participate in the IEP formulation process in a meaningful way." The district was not held to have denied FAPE to the child..

6. Jonathan G. v. Caddo Parish School Board, 875 F. Supp. 352 (W.D. La. 1994). Parents of a child with a behavior disorder alleged that the district failed to follow appropriate notice and procedural requirements before changing the student's placement. The court agreed that the school failed to provide a re-evaluation at the time of a placement change, but found no evidence that the district did not provide educational benefits. It found that the "failure to adhere to the requirements ... did not cause injury [to the student] or impede his right to receive a free appropriate education."

7. Gadsby v. Grasmick, 109 F.3d 940 (4th Cir.1997). Parents submitted a request for services in May, but the school did not develop an IEP until October, after the parents had placed the child in a private school. The school system agreed to pay the local share of the placement, but the state refused to pay and a copy of its rejection letter was not sent to the parents until two weeks after the decision. The court acknowledged a violation but said that the violation must "actually interfere" with the child's education in order to support a finding that the child was denied FAPE.

8. Board of Education v. Brett Y., 155 F.3d 557 (4th Cir. 1998). Parents claimed that their child's IEP was so deficient that it denied the child a FAPE. An Administrative Law Judge found that the IEP did not include appropriate evaluation criteria or present levels of educational performance, thus denying FAPE. The district court found these to be "minor deficiencies". The 4th Circuit agreed, and concluded that the violations did not cause the child to lose educational opportunity.

9. Cavanagh v. Grasmick, 75 F. Supp.2d 446 (D.Md.1999). Parents alleged that their child was denied FAPE when the school used a provisionally certificated teacher, allowed a pupil/teacher ratio higher than permitted, and provided only 24 hours of service per week instead of the 27.5 hours listed in the IEP. The court found that there was no showing that the procedural violations actually interfered with the child's education.

II. COMMON PROCEDURAL ERRORS

A. Failing to permit parents to examine all educational records. 34 CFR Section 300.501(a) and 562.

1. It is important to remember that the parents are entitled to review and inspect all of the student's educational records.

2. This will include the student's special education file, the school's basic record file, the discipline file, the health file, the teacher's file, and any related services provider's file.

3. The student's records also will include documents not kept at the school but at a central location.

B. Failing to provide parents with a copy of the procedural safeguards. 34 CFR Section 504(a) and *Letter to Baglin*, 33 IDELR 276 (OSEP 2000).

1. The Regulations require that parents be given a copy of procedural safeguards at certain specified times: upon initial referral for evaluation; upon each notification of an IEP meeting; upon reevaluation; and upon receipt of a request for due process.

2. For years, schools have allowed parents to waive their rights to receive copies of procedural safeguards documents when they have already received them in the past.

3. Now, OSEP has said that its position is that "IDEA does not provide for a waiver of the procedural safeguards...."

C. Failing to convene an IEP team meeting within 30 days of the determination of eligibility in order to develop an IEP. 34 CFR Section 343(b)(2).

1. The school must evaluate a student "within a reasonable period of time" after receipt of parental consent.

2. The school also must make services available, if the student is eligible, "within a reasonable period of time...."

3. However, the IEP meeting to develop the student's IEP must be conducted within 30 days of the determination of eligiblility.

D. Failing to conduct an annual review within 12 months. 34 CFR Section 343(c).

1. The Federal Regulations require each IEP to be reviewed not less than annually.

2. The IEP team must determine at its annual review if the annual goals for the student are being achieved.

3. At the annual review, any necessary revisions should occur.

4. The IEP team must be careful not to exceed the one year time frame, even if there appear to be good reasons to do so; e.g., the need for updated evaluations, parental request for an Independent Educational Evaluation, etc.

5. Remember, there can always be an additional IEP meeting to address other topics.

E. Failing to include all required attendees at an IEP meeting. 34 CFR Section 344.

1. The IEP team must include:

a. The parents.
b. At least one of the student's regular education teachers if the student is receiving or may receive regular education instruction.
c. At least one of the student's special education teachers or providers.
d. A representative of the local school system.
e. A member who is qualified to interpret the instructional implications of evaluation results.
f. The student, when appropriate.
g. Other individuals with knowledge or special expertise, including related services providers.
h. A representative of any other agency that is likely to be responsible for providing or paying for transition services, if transition will be discussed.

2. The school system representative must be someone who is (i) qualified to provide or supervise special education instruction, (ii) knowledgeable about the general education curriculum, and (iii) knowledgeable about the availability of public agency resources. Appendix A to Part 300, Q. 22.

3. Members of the IEP team may serve "double duty" if they are qualified.

4. The determination of " knowledge or special expertise" is made by the party who invites the individual to the meeting.

F. Failing to ensure adequate notice and parental participation in the IEP process. 34 CFR Section 300.345 and Appendix A to Part 300, Q.5.

1. The school must make efforts to involve the parents in the process.

2. These efforts include informing the parents about a meeting early enough to allow them to attend; scheduling the meeting at a mutually convenient time and place; notifying the parents of the purpose, time and location of the meeting and who will be attending; and advising the parents of their right to invite persons with knowledge or special expertise.

3. The school must also provide parents with copies of evaluation reports and other information sufficiently in advance of the meeting to permit the parents to participate meaningfully in the discussion.

4. A meeting can only be held without the parents if the school has been unable to convince the parents to attend. The school must maintain a record of its efforts to arrange the meeting at a mutually convenient time and place.

G. Determining school placement too early in the IEP development process. 34 CFR Section 503(a) and *Spielberg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988).

1. Even if all members of the team instinctively know before the meeting what kind of placement the student will need, the entire process must still play itself out before placement is decided.

2. Remember, too, that the team decides the program and the setting; not a pre-ordained authority from "above" (i.e., the central or district office).

H. Failing to consider behavioral interventions and strategies when required. 34 CFR Section 300.346(a)(2).

1. In developing the IEP, the team must consider strategies and supports for a student whose behavior impedes his or her learning or that of another student.

2. Remember to ask the question: Do we need to consider a Functional Behavioral

Assessment for this child?

I. Failing to comply with transition requirements. 34 CFR Section 347(b) and 348.

1. Beginning at age 14, or earlier if deemed appropriate, the IEP must include a statement of transition service needs, such as vocational classes or advanced placement classes.

2. Beginning at age 16, or earlier if deemed appropriate, the IEP must include a statement of needed transition services, including any appropriate interagency linkages.

3. If an agency that is expected to be responsible for some transition services fails to provide those services, the IEP team must meet and identify alternative strategies.

J. Failing to ensure the involvement of regular education teachers in IEP implementation. 34 CFR Section 300.342(b) and 346(d).

1. It is not enough to make sure that a regular education teacher attends the IEP meeting. The Regulations require more.

2. The student's IEP must be made available to each regular education teacher of the student, and the teachers must be informed of their responsibilities related to IEP implementation.

3. The regular education teachers also must be informed of the accommodations, modifications and supports that must be provided pursuant to the IEP.

K. Offering services based on the school's available resources. 34 CFR Section 300.346(c) and 347.

1. The Regulations require schools to include in the IEP a statement of services needed to enable the student to progress. Essentially, it is the IEP that drives the process.

2. IEP teams must take care to avoid taking an approach of "We don't offer that", or "We don't do that here", or "That would be nice, but we can't afford that", or "Our speech pathologist doesn't have time to give that much service".

3. Schools must also ensure that assistive technology devices that are needed by the student are made available at no cost.

L. Failing to follow all requirements for a manifestation determination. 34 CFR Section 523.

1. No later than 10 school days after a decision to discipline the student is made, the IEP team must meet to determine if the behavior was a manifestation of the student's disability.

2. The team must first consider existing information, including evaluation results, observations, information from the parents, the IEP and the placement.

3. Then, the team must determine that the IEP and placement were appropriate and that the services promised by the IEP were provided.

4. The team must affirmatively find that the disability did not impair the student's ability to understand the impact and consequences of the behavior.

5. The team also must affirmatively find that the disability did not impair the student's ability to control the behavior.

6. Only if the team reviews all necessary information, finds the IEP, placement and services to be appropriate, and answers the "impairment" questions affirmatively, can it then say that the behavior was not a manifestation of the disability.

7. IEP teams must be careful; there are traps for the unwary.

M. Failing to provide FAPE to suspended and expelled students with disabilities. 34 CFR Section 300.121(a) and (d).

1. Generally, each school system must make FAPE available to all students, even those who have been suspended for more than 10 days or expelled.

2. Providing FAPE means delivering services that enable the student to progress in the general education curriculum and advance toward achieving IEP goals.

3. Just what those services entail and how they are delivered will change from student to student, depending on needs.

IDEA REAUTHORIZATION 2002

P. TYSON BENNETT
REESE AND CARNEY, LLP
170 JENNIFER ROAD, SUITE 245
ANNAPOLIS, MARYLAND 21401
(410) 573-2001

I. BACKGROUND

A. Although the Individuals with Disabilities Education Act (IDEA) was most recently reauthorized by Congress in 1997, the law will return for reauthorization again in 2002.

B. During consideration of the Elementary and Secondary Education Act (ESEA) reauthorization this year, the Senate and House have sparred over special education issues.

1. Both the House and Senate passes amendments to the ESEA to end services for children with disabilities who commit assaults, and who commit weapon or drug offenses, although the two versions differed.

2. Some members of Congress believe that a lack of funding inhibits the ability of school systems to provide alternative programs for children with disabilities.

3. Some advocates working on education issues have taken the position that discipline for special education students is a topic that should be addressed during IDEA reauthorization, not during consideration of the ESEA.

C. In addition to the ESEA reauthorization debates, there are bills pending in Congress that deal with IDEA issues.

1. H.R. 651, introduced by Congressman Sam Graves, of Missouri, would expand the authority of local school systems to discipline children with disabilities.

2. H.R. 714, introduced by Congressman John Tierney, of Massachusetts, would change the law that currently permits local school systems to supplant up to 20 percent of an annual increase in federal special education appropriations.

3. H.R. 977, introduced by Congressman David Vitter, of Louisiana, would

permit local school systems to discipline children with disabilities who commit weapons or drug offenses in the same manner as they discipline regular education students.

4. S. 460, introduced by Senator Paul Wellstone, of Minnesota, would require states to provide appropriate accommodations for children with disabilities who are required to take high stakes standardized tests.

II. THE DEPARTMENT OF EDUCATION REACHES OUT

A. The U.S. Department of Education is hosting seven meetings around the country to gather information on the current status of IDEA.

B. Five of these forums (Salt Lake City, Mobile, Minneapolis, Providence and Reno) have already occurred. The remaining two will be held in Washington, D.C. on December 6, and San Antonio on December 19.

C. In a letter inviting comments, Dr. Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, asked speakers at the forums to focus on systemic issues and identify problems and proposed solutions. (Prior to his appointment, Dr. Pasternack had been New Mexico's State Director of Special Education.)

III. REAUTHORIZATION ISSUES

A. There appears to be a consensus among special education professionals that "full funding" (at the 40 percent level), discipline, and the over representation of minorities among special education students are topics of broad interest to be addressed.

B. Other needed changes.

1. Clarify FAPE for suspended and expelled students with disabilities. 20 U.S.C. Section 1412(a)(1)(A) and 34 CFR Section 300.121(d).

2. Delete the requirement for prior written notice upon high school graduation. 20 U.S.C. Section 1412(a)(1)(B), 34 CFR Section 300.122(a)(3)(iii), and 34 CFR Section 300.503.

3. Clarify the requirement for consultation with "appropriate representatives of private school children with disabilities." 20 U.S.C. Section 1412(a)(10)(A)(ii), 34 CFR Section 300.451(b), and 34 CFR Section 300.454(b).

4. Clarify the obligation to transport private school students with disabilities. 20 U.S.C. Section 1412(a)(10)(A) and 34 CFR Section 300.456(b).

5. Clarify the school's obligation to provide documents and information to parents in advance of an IEP meeting. 20 U.S.C. Section 1414(b)(4) and 34 CFR Section 534(a)(2).

6. Require parents to explain the need for an Independent Educational Evaluation. 20 U.S.C. Section 1415(b)(1) and 34 CFR Section 300.502(b)(4).

7. Permit parents to waive their right to receive a Parental Rights Booklet. 20 U.S.C. Section 1415(d) and 34 CFR Section 300.504.

8. Establish one standard for the burden of proof in a due process hearing. 20 U.S.C. Section 1415(b), (e), (f) and (k), 34 CFR Section 300.507 and 34 CFR Section 300.525.

9. Permit schools to place students in interim alternative educational settings for reasons other than weapons and drug offenses. 20 U.S.C. Section 1415(k)(1), (2) and (10), 34 CFR Section 300.520 and 34 CFR Section 300.521.

10. Clarify the FERPA restriction on referral of a student to law enforcement authorities. 20 U.S.C. Section 1415(k)(9) and 34 CFR Section 300.529.

Making the Manifestation Determination When Disciplining a Special Education Student*

By Allan G. Osborne, Jr., Ed.D.[1]

Suspensions and expulsions have long been used as disciplinary tools by school administrators.[2] Prior to imposing these sanctions, school officials must afford the student at least minimal due process.[3] However, if the student facing a long-term suspension or expulsion is disabled, additional due process is required by the Individuals with Disabilities Education Act (IDEA),[4] section 504 of the Rehabilitation Act,[5] and the Americans with Disabilities Act (ADA).[6] These additional procedures are required to assure that students with disabilities are not deprived of their right to a free appropriate public education in the least restrictive environment through the disciplinary process.[7] One of the additional procedures school officials face is the requirement to determine if the student's misconduct is a manifestation of the student's disability. This article will outline the criteria school officials must consider in making the manifestation determination.[8]

What is the Manifestation of the Disability Doctrine?

The manifestation doctrine stipulates that a school district may not expel a student with disabilities whose misbehavior is caused by the disability, but may expel the student if the misbehavior is not related to the disability.[9] This determination must be made through the change in placement procedures outlined in the IDEA.[10] This doctrine clearly limits a school district's right to expel a student with disabilities.[11]

Why Must the Manifestation Determination Be Made?

It has long been recognized by courts that the expulsion of a special education student is a change in placement.[12] To expel a student for misconduct that is a manifestation of his or her disability, the courts have reasoned, would be tantamount to punishing the student for behavior over which he or she had no control. Furthermore, an expulsion would result in a denial of the free appropriate public education the student is entitled to under federal law. Therefore, when school officials consider expelling any special education student, they first must ascertain whether the misbehavior was a manifestation of the student's disability. If it is determined that there is no connection between the disability and the misconduct, school officials may expel the student. Since it is highly likely that this decision will be challenged, it is imperative that school officials follow proper procedures when making the manifestation decision.

In the only case it has heard to date involving disciplinary sanctions applied to a special education student, the U.S. Supreme Court, in Honig v. Doe,[13] held that in passing the IDEA, Congress stripped school officials of the unilateral authority they once had to exclude disabled students from school. The Court further stated that the IDEA did not contain a dangerousness exception, but rather, created a presumption in favor of a student's current educational placement. The student's placement may be changed only by following the IDEA's change in placement procedures[14] or by court order.[15]

Who Makes the Manifestation Determination?

The determination of whether the misconduct is a manifestation of the student's disability must be made by a specialized and knowledgeable group of persons.[16] Individuals comprising the group should have personal knowledge of the student and knowledge of special education, especially in the area of the etiology and characteristics of the student's disability.[17] Ideally, the group should be composed of individuals similar to those charged with the responsibility of developing the student's individualized education program (IEP).[18] The IDEA's regulations stipulate that a school district representative who is qualified to provide or supervise special education, the student's teacher, a person qualified to interpret evaluation data, the student's parents, and the student (if appropriate) should be included in any meeting in which an IEP is developed, reviewed, or revised.[19] It is not appropriate for the school board, its subcommittees, or an individual board member to make the manifestation determination.[20] Similarly, it is not appropriate for a single administrator, such as the superintendent, to make the determination.[21]

It may be best for the manifestation decision to be made by the same group of persons who conducted the student's most last evaluation and developed the student's current IEP. Others may be called in to provide additional needed information. For example, a teacher who witnessed the misconduct and could provide a detailed description of the incident could provide insight into the cause of the misbehavior. Also, a teacher or counselor who was not part of the student's evaluation and placement team, but knows the student well, could offer valuable assistance.

The student's parents must be invited to attend any meeting where the manifestation decision is to be made. The IDEA's regulations give the parents the right to attend any meetings in which the student's educational placement is to be discussed.[22] Since the manifestation decision affects the student's placement, parents have the right to attend this meeting. If the parents disagree with the group's manifestation determination, they have the right to request a due process hearing to contest the decision.[23]

When Must the Manifestation Determination Be Made?

The burden clearly is on school officials to raise the question of whether the misconduct is a manifestation of the disability.[24] School officials must take affirmative action to make the manifestation determination when they first propose to expel the student, rather than wait for the student to challenge an expulsion decision. The manifestation determination must be made before any action is taken that would remove the student from the current educational placement for more than 10 days.

What Does Manifestation Mean?

The courts haven't been consistent in their interpretation of what is meant by manifestation. The Ninth Circuit Court of Appeals has implied that the relationship between the disability and the misconduct must be direct and causal.[25] Specifically, the court stated that manifestation of the disability refers to "conduct that is caused by, or has a direct and substantial relationship" to the student's disability.[26] This was further clarified by statements that the student's disability must significantly impair the student's behavioral controls and that the term does not embrace conduct that "bears only an attenuated relationship" to the disability.[27] On the other hand, the Fourth Circuit Court of Appeals has held that the relationship between the disability and the misconduct can be indirect or more attenuated than allowed by the Ninth Circuit.[28]

Other courts have taken an intermediate approach suggesting that manifestation implies a link between the disability and conduct but not necessarily the direct and substantial relationship required by the Ninth Circuit. For example, one court held that school districts may not expel students who are disruptive "because of" their disabilities.[29] This criterion does not necessarily require a finding that the student's behavioral controls are impaired by the disability but simply that the disability in some way causes the student to be disruptive. Another court stated that an expulsion must be accompanied by a determination as to whether the student's misconduct "bears a relationship" to the disability.[30] This court added that a determination that a student knew the difference between right and wrong was not analogous to a decision that the misconduct was not a manifestation of the disability. These decisions did not require the substantial relationship test endorsed by the Ninth Circuit, but they did require a more direct relationship between the misconduct and the disability than the Fourth Circuit required.

What Decisions Must the Group Make?

In addition to making a determination concerning whether the misconduct is a manifestation of the student's disability, consideration should be given to whether the misconduct is due to an inappropriate IEP or placement.[31] If it is due to an inappropriate IEP or placement, obviously steps must be taken to develop an appropriate IEP and placement for the student.

If the group determines that the misconduct either is a manifestation of the student's disability, or resulted from an inappropriate placement or IEP,[32] the student may not be expelled or suspended for more than 10 days[33], but school officials should reconsider the student's current placement.[34] Nonpunitive changes in placement may be appropriate and should be implemented subject to the applicable procedural safeguards[35] and the IDEA's least restrictive environment provision.[36] The student may be suspended for more than 10 days, or expelled, if the misconduct is not caused by the disability or does not result from an inappropriate IEP or placement.[37]

Can the Determination Be Based Solely on the Student's Disability Classification?

As are all decisions regarding a special education student's program, the manifestation determination must be individualized. Blanket determinations based on the characteristics generally exhibited by others with the same disability are not allowed.[38] Thus, the group must determine whether the disability, as it affects the student in question, is related to the specific misconduct. An important consideration here would be how severe the disability is for that student.[39] The group should also evaluate whether the student has any previously unidentified disabilities that could have caused the wrongdoing.[40] Furthermore, the manifestation determination must be incident-specific. Again, generalizations cannot be the determinative factor. The group must consider whether the disability, as exhibited by the student, could have caused the particular misconduct giving rise to the proposed expulsion.

May Causes Other than Disability Be Considered?

Other factors that could have caused the misbehavior may be considered as well.[41] However, when several factor contribute to the misbehavior, but the student's disability is one of the contributing factors, the nexus between disability and misconduct has been established.

Is a Re-evaluation Required?

If evaluation data is not up-to-date, a reevaluation should be conducted.[42] Even though the IDEA only requires a reevaluation every three years, one is warranted if the student's circumstances change. One such circumstance would be a sudden change in the student's behavior. Several courts also have ruled that a reevaluation is required whenever a significant change in placement is being contemplated.[43] The reevaluation should include a psychological assessment designed specifically to evoke data relative to the behavior which led to the disciplinary action.[44] If those who conducted the most recent assessments are not part of the group making the manifestation determination, they should be consulted regarding the specific incident in question. If available evaluation data is more than one year old, a reevaluation should be completed before the manifestation decision is undertaken.

Can the Parents Contest the Manifestation Decision?

As are any matters related to a student's special education program, the manifestation decision is subject to IDEA's administrative appeals process.[45] If a parent decides to contest the manifestation decision, any long-term suspension or expulsion would be stayed.[46]

What Factors Should Be Considered in Making the Manifestation Decision?

Keeping the general guidance provided by the courts and the Department of Education in mind, the outline below has been developed to assist school authorities with the difficult task of determining whether or not a given act of misconduct is a manifestation of the student's disability. School officials are cautioned, however, that above all else, the manifestation determination must be individualized. Thus, the criteria in this outline may need to be modified to fit individual student needs and situations.

Once assembled, those charged with making the manifestation determination should carefully examine and consider the following factors:

What is the student's disability classification? Identification and classification of the student as emotionally disturbed, behaviorally disordered, or some similar label, provide support for the contention that an act of misconduct may be a manifestation of the student's disability. However, the manifestation determination may not be based solely on the student's disability classification alone. The fact that a student is classified as emotionally disturbed or behaviorally disordered does not mean that the student is unable to obey school rules or control behavior. Similarly, the fact that a student has not been categorized as emotionally disturbed or behaviorally disordered does not mean that the misconduct is unrelated to the disability. For example, students with cognitive impairments may not fully comprehend why certain behaviors are not acceptable. Consideration should be given to whether or not the student's disability either prevented the student from knowing that the behavior was inappropriate, limited the student's understanding the consequences of the behavior, or impaired the student's ability to control the behavior.

What does the student's IEP say about the student's behavior? Information in the student's IEP may provide some indication as to whether or not the student's disability could cause the student to misbehave. For example, statements that the student suffers from poor self-esteem, does not understand cause and effect relationships, acts impulsively, or has low frustration tolerance could infer that under certain situations the student's misconduct could be connected to the disability. Naturally, a more direct statement such as, "At times the student has difficulty following school rules" would provide stronger evidence of a causal connection. If the student's IEP includes goals and objectives related to behavior, this may further indicate that there is a possible nexus between the disability and misconduct. The IEP may also supply information about past behaviors and the context in which misbehavior may occur.

What information does recent evaluation data provide about the student? Evaluation data, particularly psychological data, will be helpful in making the manifestation determination. If the evaluation data indicates that the student has a propensity to be disruptive, becomes easily angered, or may lash out when feeling threatened, misconduct can be predicted. Additionally, evaluation data may provide information that a student has poor impulse control, doesn't fully understand the consequences of his or her behavior, doesn't know right from wrong, etc. This information can provide valuable clues as to whether or not there is a relationship between the student's disability and misconduct. For example, a student with poor impulse control may act without regard for the consequences of the misbehavior. Evaluation data should be current so that it relates to the student's present situation. An observation of the student in the environment in which the misbehavior occurred would also provide context-specific information.

Does the student have a history of misconduct? Is the current misconduct part of a pattern of misbehavior or is it an isolated incident? An act of misconduct that is part of a pattern is more likely to be an indication of disability-related behavior than is a single isolated incident. Generally, students with a history of misbehavior have IEPs that address this issue.

What situational factors may have contributed to the misbehavior? Students may behave differently in different situations and different environments. An examination of the situation that led to the act of misconduct may provide much insight concerning a possible relationship between the misconduct and the student's disability. Consideration should be given to how the student's disability may have affected the student's judgment in this situation or interpretation of the events that led to the behavioral incident. For example, learning disabled students may misinterpret a social situation and act inappropriately because of their inability to correctly assess the situation.

How Should the Decision Be Made?

After all relevant information has been examined and the above factors have been considered, the group making the manifestation determination should proceed as they would in making any other identification, classification, or placement decision. Sound professional judgment must be exercised as there is no cookbook criterion for determining whether or not the information available indicates that the misconduct was or was not a manifestation of the student's disability. Those who make the decision must rely on their professional knowledge, their knowledge of the student, and their understanding of the circumstances that led to the misconduct to make this critical decision.

Endnotes

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[1] The author is the Assistant Principal of the Snug Harbor Community School in Quincy, MA, and a Visiting Associate Professor at Bridgewater State College, Bridgewater, MA. He is a member of the ELA Board of Directors.

[2] Robert E. Phay, THE LAW OF PROCEDURE IN STUDENT SUSPENSIONS AND EXPULSIONS, 1977.

[3] **Goss v. Lopez**, 419 U.S. 565, 95 S. Ct. 729, 42L. Ed. 2d 725 (1975).

[4] 20 U.S.C. § 1400 et seq.

[5] 29 U.S.C. § 794.

[6] 42 U.S.C. § 12101 et seq. For a thorough treatment of the requirements of the ADA and section 504, see Perry A. Zirkel and Jeanne Kincaid, Section 504, the ADA and the Schools (Supp. 3 1996).

[7] Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 [43 Ed.Law Rep. [857]] (1988).

[8] There are a number of issues concerned with the discipline of students with disabilities. However, most of these issues are beyond the scope of this article. This article is concerned solely with the manifestation decision.

[9] This concept first emerged in Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979). In Doe the expulsion of a student with mild mental disabilities for disciplinary reasons was overturned by the court. Several other courts have supported the proposition that a student with disabilities cannot be expelled for misconduct that is a manifestation of the student's disability. See for example S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981); Kaelin v. Grubbs, 682 F.2d 595 [5 Ed.Law Rep. [710]] (6th Cir. 1982); Adams Cent. Sch. Dist. v. Deist, 334 N.W.2d 775 [11 Ed.Law Rep. [1020]] (Neb. 1983) modified 338 N.W.2d 591 [13 Ed.Law Rep. [846]] (Neb. 1983); School Bd. of the County of Prince William v. Malone, 762 F.2d 1210 [25 Ed.Law Rep. [141]] (4th Cir. 1985). [Editor's note: Although this requirement has existed under case law for a number of years it was not specifically mandated by IDEA; however, after this article was submitted for publication Congress passed the Individuals with Disabilities Education Act Amendments of 1997, P.L. 105-17, which included language requiring the manifestation determination. That amendment was signed into law by President Clinton on June 4, 1997.]

[10] Before a special education student's placement can be changed, the school district must notify the parents of their intent to change the placement and give the parents the opportunity to object. If the parents object to the proposed change in placement and administrative appeals are initiated, the child's placement may not be changed while those proceedings are pending unless the parents agree to the change. 20 U.S.C. §§ 1415(b)(1)(C) and 1415(e)(3).

[11] Prior to 1990 the law was known as the Education for All Handicapped Children Act. For the sake of consistency and to avoid confusion, the law will be referred to by its current title throughout this article.

[12] Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978).

[13] 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 [43 Ed.Law Rep. [857]] (1988).

[14] See, supra n. 10.

[15] Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 [43 Ed.Law Rep. [857]] (1988).

[16] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981).

[17] OCR Memorandum: Suspensions of Handicapped Students - Deciding Whether Misbehavior Is Caused By A Child's Handicapping Condition, 16 EHLR 491 (OCR 1989). Note: Memoranda from the Office for Civil Rights (OCR) are generally directed toward the implementation of section 504; however, those cited in this article have implications for the implementation of the IDEA as well.

[18] Id.

[19] See 34 C.F.R. §§ 300.344 and 300.533(a)(3).

[20] Case Letter, 22 IDELR 370 (OSEP 1994).

[21] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981).
[22] 34 C.F.R. §§ 300.343–300.345.
[23] In Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809 [54 Ed.Law Rep. [450]] (10th Cir. 1989) the court held that disciplinary sanctions were matters affecting the student's education and thus were subject to the IDEA's administrative due process mechanism.
[24] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981).
[25] Doe v. Maher, 793 F.2d 1470 [33 Ed.Law Rep. [125]] (9th Cir. 1986), aff'd on other grounds Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed.2d 686 [43 Ed.Law Rep. [857]] (1988).
[26] Id. Doe v. Maher, at n. 8.
[27] Id.
[28] School Board of the County of Prince William v. Malone 762 F.2d 1210 [25 Ed.Law Rep. [141]] (4th Cir. 1985). Here the court overturned a determination by a committee of special education professionals that no relationship existed between the student's learning disability and his acting as a go-between in several drug transactions. Although the student was classified as learning disabled, his IEP indicated that he had borderline intelligence and had difficulty behaving. When the dispute over his expulsion reached the court level, the trial court found that the student's learning disabilities caused him to have a poor self-image, which caused him to seek peer approval by acting as the go-between in the drug transactions. That court further found that his learning disabilities prevented him from understanding the consequences of his actions. The appeals court affirmed, finding that the district court's decision was not clearly erroneous.
[29] Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979).
[30] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981). See also Kaelin v. Grubbs, 682 F.2d 595 [5 Ed. Law Rep.[710]] (6th Cir.1982).
[31] Uhler Letter, 18 IDELR 1238 (OSEP 1992).
[32] In determining whether the placement was inappropriate, the group should use the same standards that apply when prospectively determining whether a proposed placement is appropriate. Unless state law dictates otherwise, the basic criterion of an appropriate placement is whether or not it resulted in educational benefit to the student. Board of Educ. of the Hendrick Hudson Cen. Sch. Dist. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed.2d 690 [5 Ed.Law Rep. [34]] (1982).
[33] Uhler Letter, 18 IDELR 685 (OSEP 1992).
[34] Boggus Letter, 20 IDELR 625 (OSEP 1993).
[35] Id
[36] Uhler Letter, 18 IDELR 1238 (OSEP 1992).
[37] Id
[38] David Dagley, Michelle McGuire, and Charles Evans, The Relationship Test in the Discipline of Disabled Students, 88 Ed.Law Rep. [13] (1994). For a recent decision on point see J.B. v. Independent Sch. Dist. No. 191, Burnsville, Minn., 21 IDELR 1157 (D. Minn. 1995).
[39] Elk Grove Unified Sch. Dist., 16 EHLR 622 (SEA Cal. 1989).
[40] Modesto City Sch., 21 IDELR 685 (SEA Cal. 1994).
[41] Elk Grove Unified Sch. Dist., 16 EHLR 622 (SEA Cal. 1989).
[42] *In re* Child with Disabilities, 16 EHLR 207 (SEA Cal. 1989); Sioux City (IA) Sch. Dist., 16 EHLR 308 (OCR 1989).
[43] See for example Brimmer v. Traverse City Area Pub. Sch., 872 F. Supp. 447 [97 Ed.Law Rep. [207]] (W.D. Mich. 1994). In addition, OCR has stated that under section 504 a reevaluation must be conducted before any significant change in placement occurs. OCR Memorandum: Long-term Suspension or Expulsion of Handicapped Students, EHLR 307:05 (OCR 1988).
[44] OCR Memorandum: Suspensions of Handicapped Students - Deciding Whether Misbehavior Is Caused By A Child's Handicapping Condition, 16 EHLR 491 (OCR 1989).
[45] 20 U.S.C. § 1415.
[46] Boggus Letter, 20 IDELR 625 (OSEP 1993).

IDEA Update
ELA Annual Convention
November 15, 2001

Susan G. Clark, Ph.D.
University of Akron

What is special education? Specially designed instruction, at no cost to parents, to meet the unique needs of students with disabilities that result from their disabilities, that ensures access to the general education curriculum so that he or she can meet the educational standards of the school district. (34 C.F.R. § 300.26).

Substantive Disability Issues

In determining whether the IDEA has been violated, the court will examine two factors set forth in Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley (1982), one procedural, the other, substantive:

I. The Rowley Standard

A. Did school district officials follow the procedural requirements of the Act? (i.e., Was the IEP formulated in accordance with the requirements of the Act?) (Rowley, 206, 207)

B. Was the IEP reasonably calculated to confer meaningful educational benefits to the student? (Rowley, 192, 206, 207), i.e., more than trivial or de minimis (J.S.K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991). Did the instruction …

1. Comport with the child's IEP? "Benefits obtainable by children at one end of the [ability] spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." (Rowley, 202)

2. Meet state educational standards, approximating the grade level used in the state's regular education?

   Note: if the child is being educated in the regular classrooms of the public education system, the Court stated that the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade (Rowley, 209, 210).

3. Is the IEP appropriate (i.e., personalized [Rowley, 195-197])?
   - Note 1: No need to maximize potential (Rowley, 189, 190, 192).
   - Note 2: No right to the best education (Rowley, 192, 198)
   - Note 3: No right to a particular outcome (Rowley, 192).
   - Note 4: No right to compel a specific program or methodology (Rowley, 208).

II. Free Appropriate Public Education (FAPE)

A. IDEA FAPE Requirements

1. FAPE means special education and related services that are provided at no cost to parents, that meet state standards, and are in conformity with a properly constructed IEP (34 C.F.R. § 300.13).

2. FAPE is the service and placement needed by each child with a disability based on the child's unique needs and not on the child's disability (34 C.F.R. § 300.300 (a) (3) (ii))

3. FAPE must be available to any child with a disability that needs special education and related services *even if* that child is advancing from grade to grade (34 C.F.R. § 300.300 (e)).

B. Recent FAPE Case Law

Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648 (8th Cir. 2001) (holding that parents waived any challenge to alleged procedural violations during administrative process; (2) parents' procedural rights were not violated; (3) IEP proposed by district was reasonably calculated to offer student a free appropriate public education; and (4) home-based program sought by parents did not satisfy IDEA; reversed and remanded with directions).

C.M. ex rel. J.M. v. Board of Educ., Henderson County, 241 F.3d 374 (4th Cir. 2001).

Devine v. Indian River County School Board, 249 F.3d 1289 (11th Cir. 2001).

Gill ex rel. Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027 (8th Cir. 2000) (though the district court found it clear that private Lovaas based one on one instruction was an appropriate program for the student with autism, the parents failed to prove that the district's program was not reasonably calculated to confer educational benefit. The evidence showed that the student's parents, teachers, and doctors all commented positively about his progress in the district program. While parental preferences must be taken into consideration in deciding IEP goals and objectives and in making placement decisions, it cannot alone be the basis for compelling a district to provide a certain educational plan. Nor does the IDEA require that a district either maximize a student's potential or provide the best education possible at public expense).

Burilovich v. Board of Educ., Lincoln Consol. Sch., 208 F.3d 560 (6th Cir. 1998) (upholding the IEP for student with autism rather than the home-based program sought by parents; parents maintained that the proposal to include the child in the kindergarten violated the IDEA and they began home based DTT).

Houston Indep. Sch. Dist. v. Bobby R., 2000 U.S. App. LEXIS 715 (C.A.5, Jan. 20, 2000). Unreported. The Fifth Circuit held that LEA's failure to provide all the services and modifications outline in an IEP does not constitute a per se violation of the IDEA. To prevail under the IDEA, a party must show more than a de minimis failure, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provision of the IEP.

Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238 (3d Cir. 1999) (holding that the district court erred when it used the "more than trivial benefit" standard rather than the "meaningful educational benefit" standard of the IEP of a student with LD; in evaluating whether a FAPE has been furnished, an individual inquiry into the student's potential and educational needs must be made).

Renner v. Board of Educ. of Ann Arbor, 185 F.3d 635 (6th Cir. 1999) (holding that the school district's IEP provided FAPE and was designed to maximize the student's potential as per state statute. Parents of preschooler disputed the amount of discrete trial training. The court held that the IEP team had the discretion to incorporate only part of the DTT program and did not need to have any additional experts in autism or DTT to validate their status)

Metropolitan Bd. of Pub. Educ. v. Guest, 193 F.3d 457 (6th Cir. 1999) (holding that the court exceeded its authority when it determined that full inclusion remedy had been tried and had failed and consequently ordered that student be placed in a segregated, special education classroom for two-thirds of his day).

Alexander K. v. Virginia Bd. of Educ., 30 IDELR 967 (E.D. Va. 1999) (parents of a child showing signs of potential autism filed an action claiming the school's educational program did not provide FAPE, and requested the school fund a LOVAAS program in which they unilaterally placed the child. The evidence amply supported the HO's decisions that the program provided the "basic floor of opportunity" required under Rowley. The school's IEP provided FAPE and was well-designed to address all of his educational needs, including language, cognitive skills, motor skills, and social interaction. Merely because the parents contended that the Lovaas training methodology was equally or more appropriate does not require the school to implement it, nor entitle the parents to reimbursement).

Gill v. Columbia 93 Sch. Dist., 31 IDELR 29 (W.D. Mo. 1999) (although the district court found it clear that private Lovaas based one-on-one instruction was an appropriate program for the student with autism, the parents failed to prove that the district's program was not reasonably calculated to confer educational benefit).

School Bd. of Martin County v. A.S., 727 So.2d 1071 [133 Educ. L. Rep. [636]] (Fla. App. Ct. 1999) (finding the IEP of student with autism was appropriate; both parties agreed that the student was progressing which satisfied the state law requirement that education be beneficial).
aids and services cannot be achieved satisfactorily"" (Rowley, 181 n. 4).

O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 [126 Educ. L. Rep. [673]] (10th Cir. 1998) (finding that the IEP was reasonably calculated to enable student to receive more than de minimis educational benefits; finding no procedural violation where the IEP present levels of performance did not clearly convey her present levels in a way that related to her disability but because the parents participated in the IEP development and had full opportunity to discuss the child's present levels with the teachers that were fully aware of the child's present levels, and because the document referred to the specialists' reports which contained more detail).

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 [126 Educ. L. Rep. [54]] (2d Cir. 1998) (upholding appropriateness of district's proposed placement in special education class rather than residential placement; appropriateness is service that results in grade-to-grade progress for the student with disabilities).

Bend-Lapine Sch. Dist. v. D.W., 28 IDELR 734 (9th Cir. 1998) (upholding the procedural (FAPE) and substantive (methodology) appropriateness of district's IEP because it was designed to provide educational benefit to the student with an unspecified disability; the court found no merit to the claim that the district failed to provide an appropriate methodology, stating that methodology decisions are best left to districts. The fact that the student made limited progress was not enough to invalidate the IEP).

O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, 144 F.3d 692 [126 Educ. L. Rep. [673]] (10th Cir. 1998) (upholding the IEP with sign language for hearing impaired student despite minor procedural deficiencies in IEP [the parents were not informed of their due process rights or their right to the possibility of reimbursement] because the IEP was reasonably calculated to enable student to receive more than de minimis educational benefits).

Breen v. St. Charles R-IV Sch. Dist., 2 F. Supp.2d 1214 [127 Educ. L. Rep. [133]] (E.D. Mo. 1997) (the IEP was found to satisfy FAPE requirements because the provision of personalized education with sufficient support services permitted the student with ADD to benefit from education).

Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 [120 Educ. L. Rep. [61]] (4th Cir. 1997) (reversing the finding that the school district failed to accommodate the 11-year old with autism in regular education; the student made minimal progress; the district made extensive accommodations including a personal aide, curriculum modifications, teacher training, hiring a consultant in autism; the district court failed to consider the effects of the student's disruption on the rest of class; the district court's rejection of the accommodations was characterized as the adoption of a "potential maximizing standard").

Extracurricular Activities

I. Statutory Requirements

A. IDEA: Non-academic services may include athletics, counseling, transportation, recreational activities, school clubs, student employment, health services (34 C.F.R. § 300.306).

1. School districts must takes steps to provide non-academic and extracurricular services in such a manner as is necessary to afford students and equal opportunity for participation.

2. In arranging for non-academic and extracurriculars, the school district must ensure that students with disabilities participate with nondisabled students to the maximum extent appropriate (34 CF.R. § 300.553).

3. Participation in sport must be necessary for FAPE, must enable the student to receive educational benefit.

a) There must not be a reasonable probability that the student will be substantially injured by participation

b) There cannot be a direct threat to the health and safety of instructional personnel

B. Section 504 of the Rehabilitation Act of 1973: Non-academic services may include counseling services physical recreational athletics, transportation, health services, special interest groups or clubs sponsored by the school, referrals to agencies which provide assistance to handicapped persons, and employments of students, including both employment by the school district and assistance in making available outside employment (34 C.F.R. § 104.37).

1. School districts shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

2. In providing physical education courses, athletics and similar programs and activities, a school district may not discriminate on the basis of a student's handicap. A school district which provides physical education courses or that operates or sponsors interscholastic, club or intramural athletics, shall provide to qualified handicapped students an equal opportunity for participation in these activities.

3. A school district may offer handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with educational setting requirements and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

C. Americans with Disabilities Act, 42 U.S.C.A. § 12131; 28 C.F.R. § 35

PGA Tour, Inc. v. Casey Martin, 523 U.S. ---, 121 S. Ct. 1879 (2001) (applying a three part inquiry to consider 1) was the modification reasonable; 2) was the modification necessary for the individual; 3) would the modification fundamentally alter the service, program, or activity).

1. Requires the public entity to make determination as to whether the rule which disqualified the student was essential to the sport program in which student seeks to compete.

D. Recent Athletics Case Law: involving age, eight semester, and academic eligibility

Kling v. Mentor Pub. Sch. Dist. Bd. of Educ., 136 F. Supp. 2d 744 (N.D. Ohio 2001). Parents of a 19 year-old 11th grader with disabilities challenged the school's unwillingness to include participation on the cross-country team on the IEP. The student was ineligible per OHSAA regulations. The court ruled for the student and ordered that the IEP be revised to include sport and place him on the track team. The court noted that participation resulted in notable improvements in the student's academic work and self-esteem. The court also issued an injunction against the OHSAA to keep it from sanctioning the school district.

Cruz ex rel. Cruz v. Pennsylvania Interscholastic Athletic Ass'n, 34 IDELR 290 (E.D. Pa. 2001) (ordering the state athletic assocation to develop a waiver process so a 19-year old student with learning disabilities could participate in high school sport. The IDEA claim was dismissed for failing to exhaust administrative remedies, but the ADA guidelines established under PGA Tour, Inc. v. Casey Martin. The student could be eligible to return to his sports upon a showing that the requested modification to the age rule was reasonable, necessary, and did not fundamentally alter the nature of the competition. The association had other waiver processes, including one for transfers. In establishing an age-waiver rule, no undue burden would be placed on the association).

St. Joseph Pub. Schs., 34 IDELR 282 (SEA MI 2001) (holding that the school district did not intend to include interscholastic sport on the IEP, the IHO held that the student's removal from the basketball team for a conduct violation was not a placement change under the IDEA. The IEP read that the student would receive one hour study support and would "participate with nondisabled students in all other classes and extracurricular activities." Finding the wording "less than clear" and because the IEP team did not discuss sport, the IEP did not obligate the district to keep the student on the team despite his infraction).

Smelko v. Revere Local District (Aug. 23, 2000), Summit App. No. CV-00-08-3627, unreported. A senior student with a disability failed to make the 1.75 GPA in the grading period required for participation in athletics. His parent filed suit seeking preliminary injunctive relief and a restraining order because her child's IEP noted he would participate on the football, wrestling, and track teams (in the transitional section of his IEP dealing with community participation). The court found that although the student had been scouted by some college football programs and that its refusal to grant the injunction would scuttle those plans, playing football had no direct relation to his disability nor did the irreparable harm alleged cause an educational disadvantage. It declined to issue the preliminary injunction and restraining order. The court specifically noted that there was no evidence that the nature of his disability (written communication) required participation as a reasonable accommodation, football was not mandated by his IEP, and that refusal to waive eligibility requirements did not deny him the right to FAPE.

Dixon v. Hamilton City Schools and the Ohio High School Athletic Association, Case No. C-1-99-827 (US DC WD Ohio, November 4, 1999) (involving the issue of the athletic eligibility of a student identified as qualifying under the IDEA (ADHD, bipolar disorder, ODD); student repeated ninth grade and was therefore ineligible to participate in athletics during his senior year. Parents sought a court order claiming that participation in athletics was a related service for this student. The court rejected the argument, finding that participation in interscholastic athletics does not qualify as a related service under the IDEA. The court also rejected claims based on the ADA and section 504 of the Rehabilitation Act the court ruling was on a motion for a preliminary injunction which the court denied).

Transition

. Students with disabilities had been "mov[ing] from school into adult life with varying degrees of success. Some will go to college, some will enter vocational training programs, while others will enter the work force, and some will qualify for vocational rehabilitation services. Unfortunately, others will exit our nations schools into nothing." (1990 U.S. Code Cong. and Admin. News 1723, 1731-32).

Years of special education will be wasted while these individuals languish at home, their ability to become independent and self-sufficient (therefore making a positive contribution to society) placed at a significant risk. .....added a definition of 'transition services' .... aimed at preparing students (soon to leave school) for employment, post-secondary education, vocational training, continuing and adult education, adult services, independent living, or community participation. (Id. at 1732-33).

I. Background Law

A. School to Work Opportunities Act of 1994 (20 U.S.C.A. 6101 *et seq.* (West 1996) and **The Goals 2000** (P.L. 102-227)

1. Recognized the problems faced by students with disabilities in obtaining an adequate and fulfilling education to prepare them for vocational education.

a) Includes minimum drop-out rate of 90%.

b) School-to-Work opportunities to participate in education and training programs to prepare students for jobs in high-skill, high wage careers.

c) School-to-Work transition program characteristics similar to IDEA.

II. Background Case Law Principles

The IDEA does not substantively require states to ensure that all disabled children become self-sufficient (Rowley at 201-02, n. 23).

Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8th Cir. 1996), aff'g, 900 F. Supp. 1182 (D.S.D. 1995) (affirming that a S. Dakota school district's minimal approach to transition planning and implementing transition that placed most of the responsibility on the parents was insufficient in part because just about all the responsibility for the plan was put on the parents; the court stated that preparing disabled students for postsecondary education was one of the reasons for services under the IDEA; the student's success in high school, due in part to the special education she received, should not prevent her from receiving whatever transitions services she may need to be equally successful in college).

Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996) (holding that the failure of a district in Colo. to include transition services in an IEP did not amount to a denial of FAPE. The court stressed the importance of distinguishing between a statement of transition services on the IEP and the actual delivery of those services. There was substantial evidence in the record to conclude that the student had benefited from those services received.)

III. What is transition?

A. Transition is a coordinated set of activities (34 C.F.R. § 300.29; 20 U.S.C. § 1401(30)); an outcome oriented process; promotes movement from school to post-school activities including post-secondary education, vocational training, integrated employment (supported or competitive), continuing education, adult services, community participation

1. Transition must be based on individual student's needs, taking into account preferences and interests, including instruction, related services, community experiences, development of post-school employment, and other adult living objectives, if appropriate, acquisition of daily living skills and functional vocational evaluation.

2. Independent living: the philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, in order to maximize the leadership, empowerment, independence, and productivity of individuals with disabilities, and the integration and full inclusion of individuals into the mainstream of American society (Note, p. 55068, 10/22/97).

3. Facilitating IDEA goals of employment, independence, post-secondary environments.

a) The responsibility for ensuring students' disability rights shifts from school officials to the students themselves when they reach adulthood.

b) This transfer of rights provision is an indication that self-advocacy and self-determination are necessary components of a special education.

IV. IDEA 1997 Transition Requirements

A. IEP Requirements

1. Transition plans required as part of the IEP (20 U.S.C. § 1401(a)(30)).

a) Transition planning at 14; statement of needs at 16--updated annually and focused on child's course of study and including interagency links or responsibilities

2. Must consider need for related services and supplemental services, such as transportation necessary to enable the child to benefit from the transition plan.

a) Not limited to academics; includes life skills training and instruction, travel training, vocational rehabilitation, coordination of services with other adult service providers, independent living skills (e.g., money management, self-care such as cooking, cleaning), social skills training.

3. Many families request evaluation as part of transition.

a) Assessment should be of all areas suspected to pose a vocational limitation.

b) 1992 Rehabilitation Act Amendments require situational assessment (work attitudes, work tolerance, work habits, social behaviors).

B. Interagency Agreements

1. States must establish a mechanism for interagency coordination to ensure that FAPE is available and that the financial responsibility of the public agency responsible for assistive technology devices/services, related services, supplemental aids and services is described and that state Medicaid agency and other public insurers of children with disabilities shall precede the financial responsibility of the school district.

2. The district is responsible for ensuring that the student receives FAPE and that an agency is providing the services agreed upon in the IEP. Can be done by holding regular meetings, through interagency agreements, communications with agency through written reports, or other agreed upon arrangements.

3. If an agency fails to provide the agreed upon service, the district must determine whether to provide the service itself or reconvene the IEP meeting to identify alternative strategies to meet the transition objectives.

4. School district must obtain permission to disclose personally identifiable information to another agency. Permission may be requested when the need for transition services is first determined and must be in writing, signed by the parent, guardian, or the adult student (any student over 18 and considered competent to give express and informed consent), and dated. It must include specifications of the records to be disclosed, the purpose of the disclosure, and the party or class of parties to whom the disclosure is to be made.

5. Incarcerated students in adult correctional facilities are not entitled to transition services in jail if their eligibility ends before they are released from prison (20 U.S.C. § 1414(d)(6)(A)(ii); 34 C.F.R. § 300.311(b)(2).

a) The IEP team may modify the document or placement without regard to the LRE if the state has demonstrated a bona fide security or compelling penological interest that cannot be accommodated otherwise (20 U.S.C. § 1414(d)(6)(B); 34 C.F.R. § 300.311(c).

C. Graduation

1. Graduation is change of placement

a) Requires prior written notice to parents to 'ensure that parents are appropriately informed to protect the rights of the child and provide an 'option . . . to seek to resolve disagreement with a proposal to graduate the student through all appropriate means, including mediation and due process hearing proceedings (Analysis, p. 12556).

b) Age-out or graduation terminates IDEA FAPE requirements but re-evaluation is not needed to determine that the student is no longer eligible for services (34 C.F.R. § 300.534(c)(2)).

- Once acceptance is made, there is no longer eligibility for service.

- Reassessment at the point of graduation or age-out is not required unless the IEP team determines that it is.
  -Review IEP at year-end before receipt of diploma to assure that graduation requirements are met, and the goals and objectives of the IEP are completed.

- The final IEP should not include the services provided by other agencies after the student leaves the system, but may state interagency responsibilities.

c) Must be regular HS diploma, not certificate of attendance, special diploma (34 C.F.R. § 300.122(a)(3)).

d) SEA or LEA may use part B funds after graduation to provide continued services if under age 22 but can't use them in child count.

D. Age of Majority

1. Mandatory Requirement: States must establish procedures regarding informed consent for student of majority who lacks capability. State option: make explicit the transfer of rights.

Note 1: FAPE between 3-21 unless state law or practice does not provide FAPE for students 18-21 (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.121).

2. State *may provide* that when youth reaches the age of majority, unless declared incompetent, all rights "under this title" transfer to the student (20 U.S.C. § 1415(1).

a) Both student and parent receive notice of transfer of rights

b) All other rights accorded to parent transfer to student

Note 1: States must establish procedures to appoint the parent, or if unavailable, another appropriate individual, to represent the interests of the student who has not been adjudged incompetent but lacks ability to give informed consent regarding educational programming.

Note 2: All rights accorded to parents transfer to children who are incarcerated in an adult or juvenile federal, state, or local correctional institution.

Note 3: If rights transfer under IDEA, they also transfer under FERPA (34 C.F.R. § 99.5(a)), (34 C.F.R. § 300.574(c)) at age 18; notice must be provided to student and parent.

V. Recent Transition Case Law

T.S. v. Independent Sch. Dist. No. 54, 265 F.3d 1090 (10th Cir. 2001) (holding that the IDEA did not require an exit meeting for a student with a disability to determine if graduation was appropriate; the district's failure to provide him notice of upcoming graduation was not actionable without a deficiency in provision of FAPE).

Helms v. Independent Sch. Dist. #3, 750 F.2d 820 (10th Cir. 1985) (holding that graduation cannot be used as a means to end school district transition responsibility, though if so, the district would be required to provide compensatory education).

Wexler v. Westfield, 784 F.2d 176 (3d Cir. 1986) (no district responsibility for transition after graduation, or point of termination of special education programming such as drop-out, age-out).

Collective Bargaining Trends At A Glance

One hundred sixty-six master contracts between professional teacher associations and Ohio school boards on file at the State Employment Review Board contain provisions concerning the delivery of special education to students with disabilities. The data from the study indicate that school districts might expect the following as trends in collective bargaining:

1. More provisions for class size limits/equitable distribution of students with disabilities in general education due to greater student access to general education, space limitations, and teacher workload.
2. Increased costs for release time for meetings and planning within the work day (through the provision of substitutes) or before or after the workday (through compensatory schemes).

3. More aides will be used for class coverage while teachers attend IEP meetings, planning sessions, training.
4. Include planning time for aides, attendants, assistants with the educational team (may incur extra costs if before or after the workday).
5. Noncertificated staff provisions concerning training and duties.
6. Increased provisions addressing training for teachers.
7. Increased costs for training of teachers; training should consist of, but not be limited to, the law, implementing regulations, curriculum development, modification, adaptation, enrichment, teaching strategies, team-building, consensus skills, conflict management. curriculum modification.
8. Attendants will be used as teachers bargain responsibility for student health/custodial needs.
9. Increased costs for child specific training for aides and attendants.
10. Increasing budget needs for materials, equipment, supplies, and personnel.
11. Increased reporting and communication routines.
12. Ohio contracts were silent on the discipline of students with disabilities, but contracts reviewed in Illinois, Washington, and Connecticut included such provisions.

I. Class Size: Sample Provisions

A. Who determines class size?

1. In determining class size, principals must recognize that teachers have the right to give input into the decision.

2. Principals must consider any extraordinary demands on the physical space, teacher contact, supervision, and any additional responsibilities of the teacher.

3. Adjustments in class size will be made by a team: administrator, teachers involved, and special ed coordinator.

B. Efforts to Limit General Education Class Size

1. Teachers have the right to request a smaller class size when students with disabilities are present.

2. Class size will be determined on a case-by-case basis.

3. The administration shall consider mainstreamed students when making regular classroom assignments with every effort to keep those classes as small as possible.

4. Class size shall be adjusted when students with disabilities are included.

5. Class size limited: there will be a reduction of 3 students less than classes without students with disabilities; no more than 25% of the class may be in special education; no more than 30% may have an IEP; no more than 6 special education students; no more than 3; no more than 2 special education students.

Note: Implies that the presence of one or more students with disabilities requires a reduction in the number of general education students. Limiting the number of students with disabilities in any class ("quotas") may be in violation of FAPE (Letter to Reg. Civ. Rights Directors (OCR, June 12, 1985)).

C. Exceeding General Education Class Size Limits

1. More teachers will be provided.

2. Compensation schemes

   a) $150 per student per year over class maximum not to exceed 10 students per year.

   b) FTE x student contact time with standard overage payment.

II. Teacher Planning Time

A. Time for Special Educators

1. Specify minutes: at least 215 minutes per week, 43 minutes per day; minimum 250 minutes per week.
2. All special education teachers will be provided with planning/conference time.
3. Since teachers of special education must plan lessons based on each student's IEP, the number of teaching preparations will vary.

B. Team Teaching Planning Time

1. Every effort should be made or will be made to provide for common planning time between the inclusion specialist and all subject area teachers involved and to adjust the work schedule of the attendant so as to allow for team planning.

C. Regularity of Team Planning

1. Examples
   a) one Wednesday in-service per quarter
   b) at least 30 consecutive minutes per week
   c) as needed
   d) weekly
   e) at least once a month for all 7-12 teachers
   f) ½ day once a month
   g) it is expected that the classroom teacher and special educator will communicate informally on a regular basis as to the child's progress

D. Scheduling Team Planning Time

1. Teachers will adjust their classroom schedules to permit common planning time

2. Administration will provide coverage through building level staff

3. A substitute will be provided

4. An aide will be hired to provide weekly release time for special educators and regular classroom teachers

E. Planning Time Limited

1. Students with special needs at the time of admission or at points of significant changes in their program will have a scheduled teacher planning meeting that may result in an intervention plan.

2. During the workday.

F. Compensation for Planning Outside the Work Day

1. Paid planning time may include before the school day, after the school day, or during lunch; limited to 50 hours per semester at the rate of $10.00 per hour.

III. Supports and Resources for General Educators

A. Generally

1. Regular classroom teachers of special education students shall have the following services or rights: the right to IEP-mandated supplemental services for the special education student; support services will follow the student into the classroom where appropriate.

2. Teachers [affected by inclusion] shall be provided access to necessary professional assistance in the classroom and in planning for individual needs.

3. The degree of support and services and the environment in which services will be provided is a team decision and part of the IEP which is a legal document based on the student's needs; Every effort shall be brought about and enacted by the administration and teachers to provide a successful learning experience for the mainstreamed students(s) assigned to a teacher's classroom.

B. Counseling, Psychology, and Special Services

1. Teachers [affected by inclusion] should use the counseling and special services of the district to assist their instruction efforts.

2. The BOE recognizes the need to provide an adequate psychological testing program, to employ a sufficient number of psychologists and to correlate the psychologist's activities with the classroom teacher's activities so as to better meet student needs.

C. Instructional Materials and/or Equipment

1. Teachers should use all aids available to the to assist the improvement of effectiveness of their instruction.

2. Appropriate and adequate facilities, materials, and equipment will be available for disabled students in keeping with IEP provisions.

3. The special education supervisor or principal shall consult with the regular education teacher regarding equipment and materials needed to function in a regular class.

4. Special education teachers will meet with regular education teachers to share ideas about materials, equipment, etc.

5. When appropriate, emergency call devices will be provided to summon for help for special students.

D. Responsibility for Aides

1. Teachers will not be held responsible for training or evaluating the paraprofessionals (One contract stipulated that nurses are responsible for custodial and attendant aide training).

2. When another teacher, aid (sic), or volunteer is placed in the classroom with the SBH student, he/she shall perform under the direction of the classroom teacher.

E. Special Educators in the General Education Classroom

1. Additional classroom support requested by the classroom teacher may be provided when special education students are included or mainstreamed; support may include the special education teacher in the classroom.

2. Special education staff is available in every building to assist with the implementation of a student's IEP. The special education supervisor is available to staff upon request.

3. The regular classroom teacher who has [a] special needs students assigned to their classroom shall have the direct services of a certified special education teacher as needed in the classroom or as called for in the IEP.

4. Proposed schedules will reflect the presence of the special education instructor in the classroom when specific IEP objectives requiring special education instruction are being addressed.

5. When the responsibility for teaching a core subject to special education students is given to a regular education teacher, the special education teacher will be assigned to that classroom as a co-teacher/support person at least half of the time students are assigned to that teacher.

IV. Health-related Services

A. No Requirement to Perform

1. Teachers will not engage in:
   a) any medical procedures
   b) administer any medication
   c) catheterization
   d) tube feeding
   e) bandage changes or wound cleaning
   f) clean tracheostomy openings or appliances or suction and aspirate airways
   g) nursing services, IV maintenance, or injections

2. Registered and/or medically licensed personnel shall be expected to administer medicines or any other medical or nursing procedure.
    a) nurses
    b) medical technicians
    c) teachers of multihandicapped
    d) aides
    e) athletic trainers
    f) OT/PTs

Note: These provisions supported by position statements of the American Academy of Pediatrics, American Nursing Association, Ohio Nurses Practices Act, AFT, OEA, and NEA. BOE is put in position to hire and train personnel for these duties.

3. Teachers May Volunteer to Perform
    a) if volunteering, teachers are considered acting within BOE policy and within contracted duties
    b) only if trained first
    c) if related to teacher's area of certification and allowed by law and the governing body of the teacher's certification area
    d) if release is obtained from parent

4. Outsourcing Trained Personnel
    a) the association will not contest the outsourcing of work involving the administration of medication, assistance of students with bodily needs or performance of medical procedures for students unless such outsourcing is in direct violation of an agreement reached through the committee established by the alternative bargaining team on community services.
    Note: AFT, NEA, OEA support the hiring of trained nursing and/or other personnel for the administration of health and medical needs of students with disabilities.

5. Teacher Required to Perform Under Exigent Circumstances
    a) In emergencies
    b) On field trips
    c) If no reasonable alternative is available

V. Custodial Services

A. No Requirement to Perform

1. Teachers will not engage in:
    a) lifting or transferring
    b) diapering
    c) toileting
    d) personal hygiene services
    e) custodial care
    f) any health or sanitary procedure
    g) feeding
    Note: OEA, NEA, AFT preferred language

B. Teachers May Volunteer to Perform

1. If teachers volunteer, they shall be considered to be acting in accordance with BOE policy.

2. If permitted by state law.

3. If trained, with parental consent.

C. Required if Included in Job Description or *In Loco Parentis*

1. Individuals responsible for support and custodial services will be identified in the IEP.

2. MH and Head Start teachers shall perform.

3. Custodial services will be assigned to those whose job description requires such service.

4. Teacher and aide shall share custodial duties.

D. Trained and Qualified Personnel Required to Perform

1. Identified were:
   a) Trained teachers
   b) Aides
   c) Nurses
   d) Medical technicians

2. Support personnel will be provided

   a) The employer will provide the necessary personnel as required by the IEP to perform any supportive services.

   b) The association will not contest the outsourcing of work involving the administration of medication, assistance to students with bodily needs or performance of medical procedures for students unless such outsourcing is in direct violation of an agreement reached through the committee established by the alternative bargaining team on community services.

E. Teacher Required to Perform Under Exigent Circumstances

1. In an emergency

VI. Training and Staff Development

1. Training Prohibited

   a) Unit members shall not be asked nor be required to take training that would facilitate their teaching of disabled students.

2. Aides
    a) Training shall be provided for aides

3. Training Shall be Required
    a) to meet student needs; to enable the teacher to implement the IEP
    b) to provide needed student supports
    c) for custodial/health support care
    d) to explain teacher rights
    e) for emergency response

4. Determining training needs
    a) teacher determined
    b) administrator and union determined
    c) administrator and teacher determined
    d) formal needs assessment
    e) union determined

5. Amount of training
    a) annually
    b) throughout the year
    c) at least two days
    d) at least 18 hours within 3 years

6. Staff Development is BOE provided
    a) Release time provided not counted as professional leave
    b) Compensatory pay for training outside the school day
        - at hourly rate
        - at a percentage of the base salary
        - at $10.00 per hour not to exceed $50.00 per day
        - at $14.00 per hour
        - 2 full days release
        - full tuition for college courses

VII. Other Common Language

A. Definitions of Special Education Terms

1. Placement
2. Services
3. Purposes
4. Problem

B. Board Commitment to Special Education

1. Good faith effort to work with teacher union
2. Good faith effort to fund programs
3. Joint Study Teams on Inclusion
    a) Purposes
    b) Conditions under which the contract would be reopened
    c) Composition of study team
        - number of meetings
        - compensation for participation

C. Traditional Bargaining Issues

1. Lunch and rest room breaks for teachers of multihandicapped
2. RIF
3. Vacancy
4. Substitute teachers when special educators are absent

D. Records

1. Access to student files
2. Notice of record keeping duties
3. Availability of BOE policy manuals
4. Dissemination of IEP copies to impacted staff

E. Problem-solving Procedures

1. Availability of rules
2. Identification of grievable and not grievable actions
3. Alternative problem resolution process other than IEP meetings

F. IEP Review

1. When review meetings may be requested
2. Conditions that must be met prior to requesting a meeting
3. Expediency of meeting
4. Responsibility for scheduling meeting

G. Teaching Duties

1. Compliance with law
2. Attendance at meetings
3. Instructional responsibilities

H. Impact of IEP Implementation on Teacher Performance Evaluation

1. IEPs are student performance instruments, not teacher performance plans

2. Student failure to meet IEP goals does not reflect negatively on teacher performance

3. No special evaluation methods will be used to assess teacher performance

I. IEP Meetings

1. Facilitation, scheduling, notice; team composition, general educators' rights to be invited, time of day

2. Preparation for IEP Meetings
   a) Special Educators--One full day release time; extra days possible; two full days release time; compensation in lieu of release time; release time for tutors
   b) General Educators--One full day release time; release time permissible; two full days release time.

3. Attendance at IEP Meetings
   a) Special Educators--One full day release time; extra days possible; extra days if student is transitioning to new building; two full days release time; compensation for conferences outside the work day
   b) General Educators--Unlimited release time; two full days release time; one-half day release time; compensation for conferences outside the workday

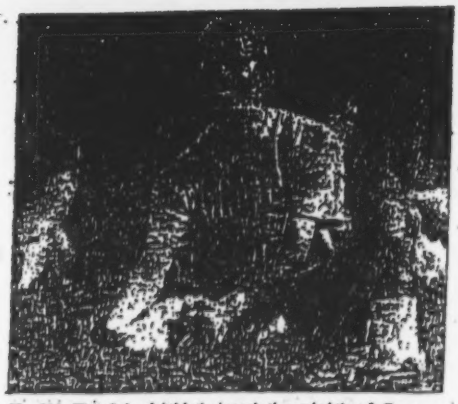
J. Least Restrictive Environment

1. Commitment to FAPE
2. Decision-making
3. Second meeting required after placement meeting
4. Teachers volunteer for placements
5. Student assignment must be equitable
6. Notice requirement before placement
7. Responsibility for monitoring placement

October 6, 2000

Winning the race of life

But runner who proved doctors wrong has been ruled too old for school team



The Ohio High School Athletic Association ruled that Jeffrey Kling was ineligible to run because he turned 19 in July, but his parents appealed and won and now the school is appealing.

By Jesse Tinsley
Plain Dealer Reporter

Mixing with other kids had always been hard for Jeffrey Kling, a shy and awkward teen with cerebral palsy and a severe hearing impairment.

But as a freshman at Mayfield High School, Kling discovered running and found the one social outlet that made him feel like a part of the student body. Like a jock. Like a regular guy.

"In the past, other attempts that have been made to get him to socialize have failed," said his mother, Kathleen Kling. "This had opened so many doors."

Running became his passion, said his father, Timothy Kling, a chemistry professor at Lakeland Community College.

But it was not easy. It took Kling, who did not begin walking until he was 4, an entire grading period before he could finish a required mile run during gym class. But he pushed on, gradually overcoming the aching lungs and sore legs to complete the distance.

By his sophomore year, Kling had improved enough to compete on the school's cross country and track teams. But Kling, now a junior, must watch from the sidelines when his cross country teammates compete because of an Ohio High School Athletic Association rule that prohibits students from participating in sports if they turn 19 before Aug. 1.

Kling's 19th birthday was July 14.

Running cross country and track - at his own special pace - gave Kling a place among fellow students. So his parents filed a complaint with the state Department of Education, hoping their son would get a chance to run again for the team.

A hearing officer from the state heard evidence and issued a ruling last week that cleared the way for Kling to run. But the Mentor and Mayfield school districts, which share responsibility for his education, appealed the decision. Kling lives in Mentor but attends Mayfield schools, which have a program for the hearing impaired.

A decision on the appeal, now before a state review officer, is expected within 45 days, said Nessa Siegel, the Klings' attorney.

If the school boards prevail, Siegel said she would appeal the case in state or federal court.

Kling's parents argued that athletics are essential to their son's education because they help his motor skills, boost his self-esteem and make it easier for him to socialize. He was a threat to no one, his parents said, and usually finished last or next to last in the races he ran.

Hearing officer Joy M. Freda ruled that Kling, despite his age, is entitled to compete under the federal Individuals With Disabilities Education Act.

But the OHSAA's so-called Rule 19 appears set in stone. The Mentor and Mayfield school districts fear they could be sanctioned if Kling is allowed to compete.

OHSAA Commissioner Clair Muscaro said the age-limit rule has been on the books for years. "It's there for all students. You need to know that all our by-laws apply to all of our students," he said.

Muscaro said any school district that knowingly allows an ineligible student to compete in sports would have to forfeit that game or competition and face possible suspension from the association.

Steven Camfield, Kling's cross country coach, was thrilled by the hearing officer's decision, calling it a case "where the little guy wins." But he said he understands the OHSAA's position.

"Rules are the rules," he said. "Making an exception could open the door to all kinds of litigation and challenges to Rule 19."

From the time he was a tot, Kling lagged behind other children. Doctors had said that Kling, born nine weeks premature, would never walk and would spend his life in a wheelchair.

But he was determined, his parents said. At age 4, he stopped using his walker and eventually let go of coffee tables and helping hands and began walking on his own.

Kling did not attend second grade until he was 10 and socialized little at school through the years.

During the summer of 1999, Kling fell in love with running. He trained with his father's help and sometimes ran eight to 10 miles a day. Last school year, he earned a letter in cross country.

He is at ease running with his teammates. He draws laughter when he sidles up to them and clowns around or begins to shadowbox before practice. His hearing impairment and speech make it difficult for people to communicate with him, but the camaraderie is evident. Kling is a jock.

"He has the best sense of humor on the cross country team," said teammate Jason Weisbrot, a senior. "I understand him better now, and we goof around. That's how we communicate. He has that smile and that enthusiasm."

Jason and other runners believe it's only right that Kling should be allowed to run during meets. "He deserves a chance," Jason said.

At the end of the 1999 track season, the Klings were told their son would be ineligible to participate on the team this school year.

"It has been a very stressful situation," Kathleen Kling said. "He goes to all the practices, rides the buses to competitions, but he can't run."

At the next cross country meet, Kling will be on the sidelines, helping with the uniforms and water. Even though he can't run, "it's cool having him around," said teammate Alex Bosoy.

E-mail: jtinsley@plaind.com
Phone: (216) 999-4889

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UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202-_____

JUL 25 2000

Dear Colleague:

On behalf of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, we are writing to you about a vital issue that affects students in school – harassment based on disability. Our purpose in writing is to develop greater awareness of this issue, to remind interested persons of the legal and educational responsibilities that institutions have to prevent and appropriately respond to disability harassment, and to suggest measures that school officials should take to address this very serious problem. This letter is not an exhaustive legal analysis. Rather, it is intended to provide a useful overview of the existing legal and educational principles related to this important issue.

Why Disability Harassment Is Such an Important Issue

Through a variety of sources, both OCR and OSERS have become aware of concerns about disability harassment in elementary and secondary schools and colleges and universities. In a series of conference calls with OSERS staff, for example, parents, disabled persons, and advocates for students with disabilities raised disability harassment as an issue that was very important to them. OCR's complaint workload has reflected a steady pace of allegations regarding this issue, while the number of court cases involving allegations of disability harassment has risen. OCR and OSERS recently conducted a joint focus group where we heard about the often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.

We take these concerns very seriously. Disability harassment can have a profound impact on students, raise safety concerns, and erode efforts to ensure that students with disabilities have equal access to the myriad benefits that an education offers. Indeed, harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement. We are committed to doing all that we can to help prevent and respond to disability harassment and lessen the harm of any harassing conduct that has occurred. We seek your support in a joint effort to address this critical issue and to promote such efforts among educators who deal with students daily.

What Laws Apply to Disability Harassment

Schools, colleges, universities, and other educational institutions have a responsibility to ensure equal educational opportunities for all students, including students with disabilities. This responsibility is based on Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which are enforced by OCR. Section 504 covers all schools, school districts, and colleges and

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Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

universities receiving federal funds.[1] Title II covers all state and local entities, including school districts and public institutions of higher education, whether or not they receive federal funds.[2] Disability harassment is a form of discrimination prohibited by Section 504 and Title II.[3] Both Section 504 and Title II provide parents and students with grievance procedures and due process remedies at the local level. Individuals and organizations also may file complaints with OCR.

States and school districts also have a responsibility under Section 504, Title II, and the Individuals with Disabilities Education Act (IDEA),[4] which is enforced by OSERS, to ensure that a free appropriate public education (FAPE) is made available to eligible students with disabilities. Disability harassment may result in a denial of FAPE under these statutes. Parents may initiate administrative due process procedures under IDEA, Section 504, or Title II to address a denial of FAPE, including a denial that results from disability harassment. Individuals and organizations also may file complaints with OCR, alleging a denial of FAPE that results from disability harassment. In addition, an individual or organization may file a complaint alleging a violation of IDEA under separate procedures with the state educational agency.[5] State compliance with IDEA, including compliance with FAPE requirements, is monitored by OSERS' Office of Special Education Programs (OSEP).

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[1] Section 504 provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a). See 34 CFR Part 104 (Section 504 implementing regulations).

[2] Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. See 28 CFR Part 35 (Title II implementing regulations).

[3] The Department of Education's Office for Civil Rights (OCR) has issued policy guidance on discriminatory harassment based on race (see 59 Fed. Reg. 11448 (Mar. 10, 1994), http://www.ed.gov/offices/OCR/race394.html) and sex (see 62 Fed Reg. 12034 (Mar. 13, 1997), http://www.ed.gov/offices/OCR/sexhar00.html. These policies make clear that school personnel who understand their legal obligations to address harassment are in the best position to recognize and prevent harassment, and to lessen the harm to students if, despite their best efforts, harassment occurs. In addition, OCR recently collaborated with the National Association of Attorneys General (NAAG) to produce a guide to raise awareness of, and provide examples of effective practices for dealing with, hate crimes and harassment in schools, including harassment based on disability. See "Protecting Students from Harassment and Hate Crime, A Guide for Schools," U.S. Department of Education, Office for Civil Rights, and the National Association of Attorneys General (Jan. 1999) (OCR/NAAG Harassment Guide), Appendix A: Sample School Policies. The OCR/NAAG Harassment Guide may be accessed on the internet at http://www.ed.gov/pubs/Harassment. These documents are a good resource for understanding the general principle of discriminatory harassment. The policy guidance on sexual harassment will be clarified to explain how OCR's longstanding regulatory requirements continue to apply in this area in light of recent Supreme Court decisions addressing the sexual harassment of students.

[4] 20 U.S.C. §1400 et seq.

[5] 34 C.F.R. § 300.660 et seq.

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Harassing conduct also may violate state and local civil rights, child abuse, and criminal laws. Some of these laws may impose obligations on educational institutions to contact or coordinate with state or local agencies or police with respect to disability harassment in some cases; failure to follow appropriate procedures under these laws could result in action against an educational institution. Many states and educational institutions also have addressed disability harassment in their general anti-harassment policies.[6]

Disability Harassment May Deny a Student an Equal Opportunity to Education under Section 504 or Title II

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program. Examples of harassment that could create a hostile environment follow.

- Several students continually remark out loud to other students during class that a student with dyslexia is "retarded" or "deaf and dumb" and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.

- A student repeatedly places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates' ability to enter the classroom.

- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability, with the result that the student tries to avoid school through increased absences.[7]

- A school administrator repeatedly denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as

[6] For more information regarding the requirements of state and local laws, consult the OCR/NAAG Harassment Guide, cited in footnote 3 above.

[7] Appropriate classroom discipline is permissible, generally, if it is of a type that is applied to all students or is consistent with the Individuals with Disabilities Education Act (IDEA) and Section 504, including the student's Individualized Education Program or Section 504 plan.

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punishment for taking time off from school for required services related to the student's disability.

- A professor repeatedly belittles and criticizes a student with a disability for using accommodations in class, with the result that the student is so discouraged that she has great difficulty performing in class and learning.

- Students continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

When disability harassment limits or denies a student's ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately.

Disability Harassment Also May Deny a Free Appropriate Public Education

Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA, as well as Section 504 and Title II. The IDEA was enacted to ensure that recipients of IDEA funds make available to students with disabilities the appropriate special education and related services that enable them to access and benefit from public education. The specific services to be provided a student with a disability are set forth in the student's individualized education program (IEP), which is developed by a team that includes the student's parents, teachers and, where appropriate, the student. Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.

How to Prevent and Respond to Disability Harassment

Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.[8] A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed.

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[8] Section 504 (at 34 CFR § 104.7) and Title II (at 28 CFR § 35.107(a)) require that institutions have published internal policies and grievance procedures to address issues of discrimination on the basis of disability, which includes disability harassment. While there need not be separate grievance procedures designed specifically for disability harassment, the grievance procedures that are available must be effective in resolving problems of this nature.

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The following measures are ways to both prevent and eliminate harassment:

- Creating a campus environment that is aware of disability concerns and sensitive to disability harassment; weaving these issues into the curriculum or programs outside the classroom.

- Encouraging parents, students, employees, and community members to discuss disability harassment and to report it when they become aware of it.

- Widely publicizing anti-harassment statements and procedures for handling discrimination complaints, because this information makes students and employees aware of what constitutes harassment, that such conduct is prohibited, that the institution will not tolerate such behavior, and that effective action, including disciplinary action, where appropriate, will be taken.

- Providing appropriate, up-to-date, and timely training for staff and students to recognize and handle potential harassment.

- Counseling both person(s) who have been harmed by harassment and person(s) who have been responsible for the harassment of others.

- Implementing monitoring programs to follow up on resolved issues of disability harassment.

- Regularly assessing and, as appropriate, modifying existing disability harassment policies and procedures for addressing the issue, to ensure effectiveness.

Technical Assistance Is Available

U.S. Secretary of Education Richard Riley has emphasized the importance of ensuring that schools are safe and free of harassment. Students can not learn in an atmosphere of fear, intimidation, or ridicule. For students with disabilities, harassment can inflict severe harm. Teachers and administrators must take emphatic action to ensure that these students are able to learn in an atmosphere free from harassment.

Disability harassment is preventable and can not be tolerated. Schools, colleges, and universities should address the issue of disability harassment not just when but before incidents occur. As noted above, awareness can be an important element in preventing harassment in the first place.

The Department of Education is committed to working with schools, parents, disability advocacy organizations, and other interested parties to ensure that no student is ever

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subjected to such conduct, and that where such conduct occurs, prompt and effective action is taken. For more information, you may contact OCR or OSEP through 1-800-USA-LEARN or 1-800-437-0833 for TTY services. You also may directly contact one of the OCR enforcement offices listed on the enclosure or OSEP, by calling (202) 205-5507 or (202) 205-5465 for TTY services.

Thank you for your attention to this serious matter.

Norma V. Cantú

Norma V. Cantú,
Assistant Secretary for
Civil Rights

Judith E. Heumann

Judith E. Heumann,
Assistant Secretary
Office of Special Education
and Rehabilitative Services

Enclosure - list of OCR enforcement offices

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Office for Civil Rights
U.S. Department of Education

400 Maryland Avenue, S.W
Washington, D.C. 20202-1100

http://www.ed.gov/offices/OCR
Customer Service #: 1-800-421-3481
TTY: 1-877-521-2172

Norma V. Cantú
Assistant Secretary
(202) 205-5526

Raymond Pierce
Deputy Assistant Secretary
(202) 205-9556

Scott Palmer
Deputy Assistant Secretary
(202) 205-5526

Lindsay Patterson
Chief of Staff
(202) 205-5526

John H. Jackson
Special Assistant
(202) 205-5526

Cathy H. Lewis
Enforcement Director for the Midwestern & Western Divisions
(202) 205-8217

Susan Bowers
Enforcement Director for the Eastern & Southern Divisions
(202) 205-8217

Jeanette Lim
Program Legal Group Director
(202) 205-8635

Lester Slayton
Resource Management Group Director
(202) 205-8233

EASTERN DIVISION

Thomas Hibino, Director
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
Office for Civil Rights, Boston Office
U.S. Department of Education
J. W. McCormack Post Office and Courthouse
Room 707, 01-0061
Boston, MA 02109-4557 (617) 223-9662
FAX (617) 223-9669; TDD (617) 223-9695

Helen Whitney, Director
New Jersey, New York, Puerto Rico, Virgin Islands
Office for Civil Rights, New York Office
U.S. Department of Education
75 Park Place, 14th Floor
New York, NY 10007-2146 (212) 637-6466
FAX (212) 264-3803; TDD (212) 637-0478

Wendella Fox, Director
Delaware, Maryland, Kentucky, Pennsylvania, West Virginia
Office for Civil Rights, Philadelphia Office
U.S. Department of Education
The Wanamaker Building
100 Penn Square East, Suite 515
Philadelphia, PA 19107 (215) 656-8541
FAX (215) 656-8605; TDD (215) 656-8604

SOUTHERN DIVISION

Gary Walker, Director
Alabama, Florida, Georgia, South Carolina, Tennessee
Office for Civil Rights, Atlanta Office
U.S. Department of Education
61 Forsyth Street, S.W., Suite 19T70
Atlanta, GA 30303 (404) 562-6350
FAX (404) 562-6455; TDD (404) 562-6454

Taylor August, Director
Arkansas, Louisiana, Mississippi, Oklahoma, Texas
Office for Civil Rights, Dallas Office
U.S. Department of Education
1999 Bryan Street, Suite 2600, 06-5010
Dallas, TX 75201 (214) 880-2459
FAX (214) 880-3082; TDD (214) 880-2456

Alice Wender, Director
North Carolina, Virginia, Washington, D.C.
Office for Civil Rights, District of Columbia Office
U.S. Department of Education
P.O. Box 14620
Washington, D.C. 20044-4620
(202) 208-2545; FAX (202) 208-7797
TDD (202) 208-7741

MIDWESTERN DIVISION

Linda McGovern, Director
Illinois, Indiana, Minnesota, Wisconsin
Office for Civil Rights, Chicago Office
U.S. Department of Education
111 North Canal Street, Suite 1053
Chicago, IL 60606-7204 (312) 886-8434
FAX (312) 353-4888; TDD (312) 353-2540

Harry Orris, Director
Michigan, Ohio
Office for Civil Rights, Cleveland Office
U.S. Department of Education
600 Superior Avenue East
Bank One Center, Room 750
Cleveland, OH 44114-2611 (216) 522-4970
FAX (216) 522-2573; TDD (216) 522-4944

Angela Bennett, Director
Iowa, Kansas, Missouri, Nebraska, North Dakota, South Dakota
Office for Civil Rights, Kansas City Office
U.S. Department of Education
10220 North Executive Hills Boulevard
8th Floor, 07-6010
Kansas City, MO 64153-1367 (816)880-4200
FAX (816) 891-0644; TDD (816) 891-0582

WESTERN DIVISION

Lillian Gutierrez, Director
Arizona, Colorado, Montana, New Mexico, Utah, Wyoming
Office for Civil Rights, Denver Office
U.S. Department of Education
Federal Building, Suite 310, 08-7010
1244 Speer Boulevard
Denver, CO 80204-3582 (303) 844-5695
FAX (303) 844-4303; TDD (303) 844-3417

Stefan Rosenzweig, Director
California
Office for Civil Rights, San Francisco Office
U.S. Department of Education
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, CA 94102-4102 (415) 556-4275
FAX (415) 437-7783 TDD (415) 437-7786

Gary Jackson, Director
Alaska, Hawaii, Idaho, Nevada, Oregon, Washington, Pacific Region
Office for Civil Rights, Seattle Office
U.S. Department of Education
915 Second Avenue, Room 3310
Seattle, WA 98174-1099 (206) 220-7900
FAX (206) 220-7887; TDD (206) 220-7907

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Hobson, Letter to (Speech Servs.)

Office of Special Education and Rehabilitative Services

Honorable David L. Hobson House of Representatives Washington, DC 20515

Digest of Inquiry

[Date Not Provided]

- What obligation do districts have to provide special education services to students with disability placed in private schools by their parents?

Digest of Response

January 21, 2000

OSERS responded to an inquiry concerning the district's requirement to provide speech services to a student placed in a private school by the student's parents. The IDEA required district's to allow such student's equitable participation in IDEA part B programs, depending on the number and location of students in the state. Districts were further required to spend a proportionate share of federal funding on those students. However, while the district was required to consult with the private schools to determine the provision of the services, no parentally placed private school student had an individual right to related services. There was also no guarantee under the IDEA that the district would continue to provide the same services from year-to-year. Nor did the IDEA impose specific requirements on how or where districts were to provide the services. Finally, if a private school elected to not contract with the district for the provision of services, the IDEA imposed no obligation on the district to arrange for an alternate way of providing those services, as long as the district met the equitable participation and funding expenditure requirements.

20000121

Dear Representative Hobson:

Your letter dated October 27, 1999 to the Department's Office of Legislation and Congressional Affairs, written on behalf of your constituents, [ ], has been referred to the Office of Special Education and Rehabilitation Services (OSERS) for response. Your constituents have sought your assistance because this school year they have been unable to obtain speech services from the [ ] Schools for their disabled children in connection with their parental private school placements.

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In their letter, your constituents indicate that the School District has declined to provide their children with speech services, even if they would agree to transport their children to the pubic school to receive such services. According to their letter, the private school will not contract with a public school to provide the same services, and your constituents are questioning why they are not permitted to choose a certified teacher, in conjunction with the local Public School system, who would serve their children at the private school at public expense. Your constituents are also asking that pertinent regulations implementing the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97) be reexamined.

As in the past, IDEA '97 and its implementing regulations continue to require States and school districts to provide for the participation of parentally-placed private school children with disabilities in programs assisted or carried out under Part B through the provision of special education and related services, consistent with their number and location in the State. 20 U.S.C. § 1412(a)(10)(A); 34 CFR § 300.452. In meeting their obligations to parentally-placed private school children with disabilities, each local educational agency (LEA) must expend a proportionate share of available Federal funds on services for these children. 20 U.S.C. § 1412(a)(10)(A); 34 CFR § 300.453. IDEA '97 also clarifies that services provided to private school children with disabilities may be provided on-site at a child's private school, including a religious school, to the extent consistent with law. 34 CFR § 300.456(a).

In addition, as was true prior to the enactment of IDEA '97 and implementing regulations under Part B, no parentally-placed private school child with a disability has an individual right to some or all of the special education and related services that the child would receive if enrolled in a public school. 34 CFR § 300.454(a) and 300.455(a)(3). Instead, decisions about the services that will be provided to parentally-placed private school children with disabilities as a group must be made in accordance with § 300.454(b)-(c). Paragraph (b) of § 300.454 provides that each LEA must consult, in a timely and meaningful way, with appropriate representatives of private school children with disabilities, in light of available funding and the numbers and location of such children, on matters such as the numbers of parentally-placed private school children with disabilities to be served, the services that will be provided, how and where the services will be provided, and how the services will be evaluated. 34 CFR § 300.454(b).

Since no parentally-placed private school child with a disability has an individual right to special education and related services, the child's receipt of services from a public agency in one school year does not automatically entitle the child to continue to receive those services in a subsequent school year. In addition, Part B does not specifically prescribe how a school district must serve those parentally-placed disabled children whom the school district elects to serve. This would include the location and manner in which services are provided.

In light of their private school's decision not to contract with the local school district to provide speech services, your constituents suggest that services instead could be offered at the local school district or provided on the premises of a private school by an individual paid by the school district directly. If an LEA determines, through consultation with appropriate representatives of private school students with disabilities, that it will serve its parentally-placed private school students with disabilities through contracting with the private school to provide specific services, and the private school elects not to do so, we find nothing in Part B that would require LEA to offer a disabled child services through some other arrangement, provided that the LEA ensures equitable participation of the group of parentally-placed private school children with disabilities and meets the expenditure requirements in 34 CFR § 300.453 of the Part B regulations.

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Your constituents also suggest in the letter to you that the regulations governing services for parentally-placed private school children with disabilities be reexamined. These regulations were published in final form on March 12, 1999 after an extensive public comment process, and thorough consideration was given to public comments received, including those concerning services for parentally-placed private school children with disabilities. We believe that these regulations correctly implement the statutory provision at 20 U.S.C. § 1412(a)(10)(A), and reflect the Department's longstanding interpretations of the requirements that are applicable to the equitable participation of parentally-placed private school children with disabilities in programs assisted or carried out under Part B.

We would urge your constituents to work with officials of the [ ] Schools and their State Department of Education to find out more services for parentally-placed private school children with disabilities in Ohio. Your constituents can contact the named official of the Ohio Department of Education at the following address and telephone number:

Mr. John Herner

Director

Division of Special Education

Ohio Department of Education

933 High Street

Worthington, Ohio 43085-4087

Telephone: (614) 466-2650

We hope that you and your constituents find this explanation helpful. If we can be of further assistance to you or your constituents, please contact Dr. JoLeta Reynolds or Ms. Rhonda Weiss, at (202) 205-5507, or(202) 205-9053, respectively.

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